CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, OCTOBER TERM, 1836.

POSTLEWHAITE vs. *HUNT & AL.*

APPEAL from the court of the seventh district.

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When the appellant brings up a record, without a statement of facts, &c. so that the case cannot be reviewed, the appeal will be dismissed, on the appellee's motion.

PORTER, J. delivered the opinion of the court. In this case there is neither statement of facts, bill of exceptions, nor evidence taken down by the clerk. The record contains no matter which enables us, to review the proceedings of the tribunal of the first instance.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

Rost for the plaintiff, *Wilson* for the defendants.

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Where a *certiorari* has been granted to obtain the judge's certificate, due diligence must be used to have it returned, or the appeal will be dismissed.

PRUDHOMME vs. *MURPHY.*

APPEAL from the court of the sixth district.

MARTIN J. delivered the opinion of the court. The appellant has moved to have the judgment reversed and the case remanded for trial, urging that, without any fault on his part, the transcript is not in a situation to enable us to examine the merits of the case.

His counsel has made affidavit that in May, 1824, he procured the certificate of the judge *a quo*, that the record contains the whole evidence on which the case was heard, and handed it to the clerk, who neglected to annex it to the record. That on this a *certiorari* was obtained from this court in September 1824, directing the judge to transmit a certificate—that the counsel gave notice of this to the judge, who said he would examine the record and furnish the certificate, which, however, he did not do, and died in May, 1826.

We think sufficient dilligence has not been used to justify us in depriving the appellee of his judgment,

It does not appear the *certiorari* was taken out: none is returned. The counsel shews only a verbal application to the judge, the time of which is not stated. The certificate obtained, in fine, is not alleged to be lost, and for any thing sworn to, is still in the clerk's office. The judge lived a year and eight months after the *certiorari* was applied for. The counsel could not well expect to receive a new certificate *de plano*, without giving the judge time to examine the record, and he rested satisfied with the judge's promise to furnish the certificate, without once calling for it. If death prevented the judge from making the certificate, the counsel must have been quiet for upwards of a year, and if he applied early, there was abundance of time to call for the certificate, after the judge had time to satisfy himself of the propriety of granting it, by an inspection of the record.

As we are unable, from the state of the record, to revise the judgment, the appeal must be dismissed with costs.

Rost for the plaintiff, *Morris* for the defendant.

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The omission to charge an item in an account that is shewn to be justly due, does not prevent a subsequent demand for it.

PAVIE vs. *NOYREL.*

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The plaintiff and defendant entered into partnership, and agreed to put in an equal capital: after the dissolution of the firm, the former set up a claim for interest on moneys advanced by him above the amount of stock he was obliged to furnish, and also for his expenses while attending to the affairs of the firm in New-Orleans.

To a petition setting forth these facts, and claiming the sum of five thousand dollars, the defendant pleaded;

1st. That the residence of the plaintiff in New-Orleans was not beneficial to the firm.

2d. That different accounts had been settled with the plaintiff, in which no such claims were set up as these advanced in the petition; that a final settlement had taken place between them, and that the plaintiff has received his portion of the partnership property.

3d. That the plaintiff had injured the partnership by his neglect, and bad management of the common affairs, to the amount of $5000.

4th. That the plaintiff has been credited twice for the sum of $428 92 cents.

5th. That he had occupied himself during the partnership with business other than that of the firm, by which he had gained $3000, one half of which he should account for.

The answer concludes with a prayer in reconvention, and prays that there may be judgment against the plaintiff.

The answer was submitted to a jury who found a verdict against the defendant for $1566, 50 cents; from the judgment rendered in conformity therewith he has appealed.

The counsel have argued the question whether interest could be properly charged on advances made by one partner, for the benefit of the firm: but the finding of the jury renders it unnecessary for us to go into that question, as the amount claimed for the expenses during the time the plaintiff was transacting the common affairs in New-Orleans, justifies the verdict.

It has also been contended, that as several accounts current passed between the parties, in which no mention is made of this item, that the appellee was estopped from claiming it in this suit. But if the demand be legal and

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just, it is our opinion that the silence of the plaintiff respecting it, or his omission to put it into the account, cannot prevent him from recovering this. It was an error which should not prejudice his rights. In the case of *Girod* vs. *the Mayor*, &c. cited by defendant's counsel, there were many circumstances which this does not exhibit; repeated receipts given by the plaintiff, forced upon the court the conclusion that his subsequent claim for salary was inconsistent with the agreement which tho' not expressed, was well understood between the parties. 4 *Martin*, 706.

The defendant however insists, that even admitting the verdict of the jury to be correct, in relation to the expence incurred by the plaintiff, while transacting the partnership affairs, there is an evident error in not allowing the defendant credit, for a sum which in the account current was twice charged by the plaintiff. It is impossible for the court to say where so many facts were put at issue, and so many different considerations submitted to the jury, whether they allowed this sum or not. Under these circumstances we feel unwilling to disturb the verdict. The point is precisely that made in the case of *Richardson* vs. *De-*

buys and Longer, and must receive a similar decision. *Vol. 4, n. s. 132.*

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Bullard for the plaintiff, *Rost* for the defendant.

FREDEAU vs. *GRILLET.*

APPEAL from the court of the sixth district.

When no question of law arises in a case, the verdict is not not disturbed unless manifestly erroneous.

MATTHEWS, J. delivered the opinion of the court. This is a suit instituted by the purchaser of a certain tract or piece of land, to compel the seller to deliver it to him, according to the terms and conditions of the act of sale. The cause was submitted to a jury in the court below, who rendered a verdict in favor of the plaintiff, on which judgment was given, and the defendant appealed.

The case presents no questions of law; and after strict examination of all the evidence we are of opinion, that the verdict and judgment are fully supported by the facts of the case, and are in exact conformity with the contract on which the action is founded.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Rost & *Johnston* for the plaintiff, *Bullard* for the defendant.

HESSER vs. *BLACK & AL.*

A deed cannot be set aside as fraudulent by a creditor who becomes such after the date of the alienation, unless it be proved it was made with an intention to defraud future creditors.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This action is brought to recover possession of a tract of land from the defendants, who set up title to it under a sale made by the sheriff of the parish of Natchitoches, in the year 1825. This sale purports to be made under a judgment rendered against the father of the plaintiff. The answer avers that the conveyances under which the plaintiff claims are fraudulent and void.

It appears in evidence, that the father sold to one Poissat, in the year 1808; and that the deed from Poissat to the plaintiff, is dated the 30th October, 1820. The judgment under which the defendants claim was rendered in 1817.

We have been in the habit of giving great weight to the decisions of the court below on questions of this kind. But in the present instance we are unable to see any evidence on which the judge *a quo* sustained the defence. The error into which he fell, most probably arose from consideriug this as an ordinary case where creditors attack an act made in fraud of their rights. The proof adduccd. shews, however, that the plaintiff, in execution, did not become creditor until years after the date of this conveyance from the plaintiff's father, which is alleged to be fraudulent. Under such circumstances our law only gave an action, when it was proved that at the time of the alienation the party alienating *had the intention to defraud the future creditor*. The great difficulty of furnishing this proof, in practice, made the Spanish jurisprudence very nearly the same as the Roman, where the rule was, that subsequent creditors could not revoke alienations made previous to their contracting with their debtors, unless the money lent went to pay the old creditors, in which case it was held the new ones might exercise their rights. The amendments lately made to the civil code, contain a

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positive provision, that creditors cannot annul a contract made before the time their debt accrues. *ff. quæ in fraud. cred. L.* 10, § 1. *l.* 15 & 16. *Curia Phillip. Lib.* 2, *cap.* 13, *verbo revocatoria No.* 12. *Lou. Code* 1988. *See also the case of Sides* vs. *McCullough*, 7 *Martin* 655.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff do recover of the defendants the premises mentioned in the petition, with costs in both courts.

Bullard for the plaintiff, *Morris* for the defendant.

HEIRS OF ROUQUIER vs. *EX'RS OF ROUQUIER.*

Land given by the Spanish government to the husband, did not enter into the community.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The heirs of the wife claim a tract of land in possession of the executors of the husband, on the ground that it made a part of the community of acquests and gains, and that the husband, in his life time, sold to them

all the property which he had held in community with his wife.

The only question in the case is, whether the tract of land sued for made a part of the community of acquests and gains. It appears clear to us it did not. The title from the Spanish government was, it is true, obtained during coverture, but the concession was in the name of the husband alone, and it has been already decided in the case of *De Lemos* vs. *Garcia*, that lands granted by the king to one of the married parties, did not enter into the community. This opinion has been lately reviewed and confirmed in the case of *Frique* vs. *Hopkins*, where the subject has been gone into at length. *Vol.* 1*st*, 334; 4*th ibid.* 384.

The plaintiffs have endeavored to distinguish the rights of the parties before us, from those already decided, on the ground that the motive for asking for the land from the government was, that it might benefit the community property. The weight to which this argument is entitled has been considered in the case last cited, and our opinion fully expressed on it. We are satisfied that it cannot have the influence which the plaintiffs

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attach to it; and even if it did, the facts of the case do not bring them within the exception contended for; for the grantee asks for the land, not for the use of the property of the community, but for his own, *ses propres animaux*.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Deblieux for the plaintiffs, *Rost* for the defendants.

WM. WATSON & CO. vs. *CLARE*, CURATOR.

APPEAL from the court of the sixth district.

Where the appellant, without any fault of his, is unable to bring up the case, so that the merits can be examined the cause will be remanded for a new trial.

MARTIN, J. delivered the opinion of the court. The plaintiffs and appellants oppose the application of the appellee to dismiss the appeal, on the ground of the insufficiency of the statement of facts, by shewing that the judgment was rendered before the code of practice went into operation, and that these appeals from the courts of probates were returnable to the district court, who heard the cause *de novo* and received evidence that had not been offered below.

He urges that the code ought not to place

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him in a worse situation, by compelling him to produce the statement of facts required here, while nothing made it binding to procure it below, at the time the judgment was given.

As the plaintiffs find themselves without their fault, unable to place the merits of the case before us, we think they are entitled to relief, and we cannot afford it otherwise than by remanding the cause for a new trial, as we are authorised to do, whenever justice cannot be attained otherwise. *Porter* vs. *Dugat*. 9 *Martin*.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed, and the case remanded for a new trial, the appellee paying costs in this court.

Rost for the plaintiff, *Wilson* for the defendant.

ROMAN CATHOLIC CHURCH vs. *MILLER*.

The judge of probates may certify the record at any time after judgment.

A legacy of so much money in a drawer, is only good for the sum found there at the decease of the testator.

APPEAL from the court of the seventh district.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim $500, under a

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legacy of that sum (in the will of the late D. Garcia,) "enclosed in a letter and deposited in my (the testators) armoir, or cloths press, in a drawer marked No. 2." The curator of the estate refused the demand on the ground of the legacy being a nullity, the money not being found in the drawer at the death of the testator. The plaintiffs had judgment, and the defendant appealed.

The appellees prayed for a dismissal of the appeal for want of a statement of facts, done *in due time*. There is no statement of facts, but a certificate of the judge of probates, several months after the judgment, attesting the record contains all the proceedings and evidence adduced on the trial.

We think this suffices: The act of 1820 requires that all the testimony given at the trial of a cause in the court of probates, shall at the time be reduced to writing, to serve as a statement of facts. This being the case, and there appearing depositions of witnesses, we must conclude that all the evidence was reduced to writing. And the transcript of the record duly certified, enables us to examine the merits of the case, and this certificate may be made after the judgment.

It appears that on opening the will, on the day the testator was buried, one hundred and seventy dollars and two cents, only, were found in the drawer marked No. 2, but upwards of seven hundred dollars were found in this and the other drawers.

The plaintiff's legacy is a *particular* one. The legacy of the property I possess *in such a place*, is a particular one. 5 *Toulier* 487 & 514. And the nature of the legacy is not varied because a sum of money is bequeathed. A legacy of *one hundred reals, which I have in such a box*, is good for so much as the testator has there, up to that sum. 1 *Febrero c.* 2, § 2, *p.* 24. And we have received from Spain a positive legislative provision on this respect. *Part* 6, 9, 18. *Mor. & Car.* 962.

We think the judge ought to have restrained the legacy to the money found in the designated drawer.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that there be judgment in favor of the plaintiffs for one hundred and seventy dollars and two cents, with interest from the judicial demand, with costs in the

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court below. The costs of appeal to be paid by the appellee.

Rost & Johnston for the plaintiff, *Fennessey* for the defendant.

BURK vs. *WILLIAMSON.*

Appeal dismissed for want of a statement of facts.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. In this case, there being no statement of facts as the law requires, it is ordered, adjudged and decreed, that the appeal be dismissed, and that the appellants pay costs.

Johnston for the plaintiff, *January* for the defendant.

SPRIGG vs. *WELLS.*

A judgment is not final until signed by the judge.

APPEAL from the court of the sixth district.

MATTHEWS, J. delivered the opinion of the court. In this suit the plaintiff claims a lien or privilege on property, in the hands of a third possessor, resulting from a judicial mortgage. His claim being sustained by the judgment of the court below, the defendant appealed.

The only question presented by the case to be solved arises out of the construction or interpretation of the law relative to the recording of judgments. To give such recording or registering the effect of a mortgage, (from the date of the judgment) it is required, that it be made within ten days from the time at which such judgment may have been rendered. *See* 1 *Martin, p.* 701 and 704. In the present case the evidence shews, that the judgment was entered on the minutes of the court by the clerk, on the 9th of June, 1823, and signed by the judge on the 21st of the same month, and on this latter day was recorded in the office of the parish judge. The counsel for the appellant contends, that this is not a registry made conformably to the provisions of the law above cited; because the recording should have taken place within ten days from the day when the entry was made on the minutes of the court, viz: on the 9th of June. We are however, of a different opinion.

The law requires the judges of the inferior courts of the state, to sign their judgments within three days after they have been pronounced or rendered: the signature of the

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judge, according to this regulation is essential to the perfection of a judgment; and although it should not receive such signature until after three days, it does not acquire the force of a judgment, until completed and perfected by the name of the judge thereto subscribed. A judgment is not final until signed by the judge: at least it is not so in all respects, even admitting it to be entitled to that appellation, as distinguished from interlocutory orders. The law contemplates the recording of a final judgment, and that on which the present claim of mortgage is based, was recorded on the very day on which it became complete and final.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiff, *Scott* for the defendant.

DOWNS vs. *KEMPER.*

APPEAL from the court of the sixth district.

Damages allowed on a frivolous appeal.

PORTER, J. delivered the opinion of the court. This action is brought to recover a sum of money received by the defendant on account of one Goss, of whose estate the plain-

tiff is administrator. Interrogatories annexed to the petition, and which are unanswered, fully make out the case of the appellee. The defence set up, is unsupported by proof of any kind, and this appeal could have been taken for no other purposes but delay. We cannot therefore refuse the prayer of the plaintiff, that damages should be given for resorting to this tribunal for no other purpose but retarding the execution of the judgment of the court below.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and ten per centum damages on the amount of said judgment.

Thomas for the plaintiff, *Scott* for the defendant.

MARTIN vs. *MARTIN*.

APPEAL from the court of the sixth district.

Citation of appeal must issue in the name of the state.

MATTHEWS, J. delivered the opinion of the court. This appeal is taken from a judgment of the district court by which an appeal brought before that court, from the court of probates, was dismissed. The judge *a quo* refused to examine the case on its merits, as appears from the reasons adduced in support

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of his judgment, on account of informalities in the citation of the district court. The form of citations in appeals is prescribed by law and ought to be strictly pursued, or at least they should contain all material things ordained. According to the constitution of the state, all process must issue in its name.

It is true that this court has decided in the case of *Bludworth* vs. *Somperac*, as reported in 3 *Martin*, 709, that the style of the state was not necessary to a citation in a civil suit, as it was not required in the form established by the law which directed and governed the practice of the courts under the territorial government. But according to the form laid down by that law for citations on appeals, these proceedings were required to issue in the name and style of that government. We are therefore of opinion that the court below was correct in dismissing the appeal, for the reasons given in the judgment, which are the imperfections in the citation, as not containing a proper caption, and not having been made in reference to any return day.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Scott for the plaintiffs, *Bullard* for the defendants.

HOOTER'S HEIRS vs. *TIPPETT.*

In a suit for land where the pretensions of the parties are alike in law and equity, he who is in possession will prevail.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The plaintiffs state that they are the heirs of the late Jacob Hooter, who in his lifetime presented a requete, for a tract of land on the left bank of the Bayou Rapides, containing ten arpents in front, with the ordinary depth of forty: that he had it surveyed by an authorised surveyor under the Spanish government, and that the claim founded on these proceedings, was regularly entered with the register of the land office in the name of the estate of Jacob Hooter.

They further state, that the defendant, after this entry was made, procured an illegal sale to be made of the said tract of land, by the judge of probates of the parish of Rapides, and prevailed upon the commissioners of the United States to issue a certificate in conformity with said sale in the name of the defendant.

The petitioner concludes with a prayer that

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the plaintiffs may have possession adjudged to them and that the title may be decreed to be in them.

The answer denies all the allegations in the petition, avers title in the defendant, under the commissioner's certificate; by prescription of ten years under a just title. That the land was settled previous to the 20th December 1803, by permission of the Spanish authority by defendant. That the title of the plaintiffs has been acquired by him in virtue of the sale by the court of probates in the year 1808, and concludes by a prayer that he may be reimbursed for valuable improvements which he has made on the premises.

The judge below decided against the plaintiffs, and they appealed.

The evidence shows that a *requete* issued in the name of the plaintiff's ancestor, that it was entered in the land office in their name, and that a certificate issued in favor of defendant. The commissioners state that the U. States relinquish their title, in consequence of the requete already mentioned, and proof of settlement on or previous to the 20th of December, 1803.

But this settlement is proved to have been

made by the d fendant, and in his own name. There is no evidence that the plaintiffs ever occupied, or cultivated the land in question, or that the survey which they allege in the petition was made.

This case presents a conflict between two parties, each presenting the weakest title to the soil that can be well imagined. The plaintiffs shew permission to settle without settlement, and the defendant settlement without permission. The plaintiffs have obtained no relinquishment of soil from the government of the United tates, and that produced in favor of the defendant was issued on the settlement by him it is true, but also on the *requete* of the plaintiff's ancestor. Under such circumstances, we consider the pretentions of each about equal in law and eq ity, and the defendant being in possession cannot be disturbed.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiffs, *Wilson* for the defendant.

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DOUGLASS & AL. vs. CURTIS.

When judgment is given against a defendant in a representative capacity, but this fact is not mentioned in it, recording the judgment will not give a lien on the property of the principal.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The plaintiffs after the death of John Curtis, sued his widow for a sum of money due to them, and obtained judgment which they had duly recorded. In the petition on which this judgment was rendered, they state that since the execution of the note Curtis had deceased, leaving a widow, Nancy Curtis, who had taken upon herself the administration of the estate, and who had accepted of the said succession, which is more than sufficient to pay the debts, in her capacity of widow, and as natural tutrix to her minor children, heirs of the said John Curtis.

The answer was put in, in her individual capacity and the judgment condemns her in the same character.

In the petition filed in this cause, the petitioners state, that by virtue of this judgment, which was duly rendered, they had obtained a mortgage "on all the real estate then in the possession of the widow, as well such as she held in her own right, as that held as widow and natural tutrix, belonging to the suc-

cession of her husband, the late John Curtis, having accepted the succession purely and simply, and having made herself liable for the payment of all the debts of the community, and held the said estate in the same manner in which it was at the death of the husband."

They proceed to state that at the time the said judgment was rendered and recorded, and for some time thereafter, the said widow held a number of slaves belonging to the succession of the said John Curtis, upon which the judgment operated as a lien or mortgage: that several of them had come into the possession of the defendant in this suit, who refuses either to pay the debt, or surrender the property to be sold. They conclude by praying that the slaves may be sold.

The defendant pleads, first, the general issue: second, that the plaintiffs had a special mortgage on sundry slaves, of which John Curtis had seized, and which, after his death, were sold at probate sale for an amount more than sufficient to pay the plaintiffs' demand, and which they are obliged to discuss: third, that he holds the negroes, mentioned in the plaintiffs' petition,

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under a *bona fide* sale from the sheriff, acting in his official character, for a valuable consideration, who, at the time of sale, produced a certificate from the parish judge, that the slaves were free from mortgage.

The court of the first instance gave judgment for the defendant, and the plaintiffs appealed.

Nothing in the evidence, as it appears on record, sustains the plea of discussion. The facts alleged in the petition are supported by proof; and the only questions which the case presents are those of law.

The first ground of defence assumed by the defendant, is, that the judgment as recorded in the office of the register of mortgages for the parish of Rapides, gave no mortgage on the property on which the plaintiffs now seek to make it attach. The judgment is in the following words: "*Douglass & Cage* vs. *Nancy Curtis*. By reason of the law, and evidence being in favor of the plaintiffs, it is ordered and adjudged, that they recover from the defendant the sum of two thousand and fifty dollars, with five per cent. interest per annum from the 1st March

last until paid, and costs of suit to be taxed. May 27, 1820. (Signed)

WM. MURRAY, *Judge 6th district.*"

The property which the plaintiffs pray may be seized and sold to satisfy this judgment, is stated in the petition to have *belonged to the succession of John Curtis*, and the question therefore is, whether a judgment recorded against *Nancy Curtis*, operated as a mortgage on the property *of the succession of John Curtis.*

On the first view of this question, it appears extremely clear, and there is scarcely any legal mind to which it was proposed, that would not at once answer it in the negative. But the solution becomes more difficult when we recur to the pleadings of the case in which this judgment was rendered.

By them we find that the defendant, Nancy Curtis, was sued on an obligation made by her deceased husband, John Curtis. In the petition it is stated that she had taken on herself the administration of his estate: that in her capacity of widow, and as natural tutrix to her minor children, she had been requested to pay the said debt which she had refused to do: judgment was there-

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fore prayed against her for the amount of the obligation.

In consequence of these averments the plaintiffs contend, that the defendant was sued as representative of the estate of her deceased husband—that although the judgment makes no mention of the fact, yet, as it is general in its terms, it must be understood to follow the obligation it enforces: that it was therefore, in fact, a judgment against the estate; and that if the property now sued for, would have been liable to be seized in satisfaction of it, in the hands of the defendant, it must be equally so in the hands of those into whose possession it has passed. *U. States* vs. *Hawkins, vol.* 4, 317. *Baudin* vs. *Dubourg* & *Baudin, ib.* 496.

This reasoning is certainly specious, but it is not sound. The proposition that the judgment must have the same force against the property of the defendant, purchased by third persons, that it would have had on that property, if it had remained in his possession, is only true, where it has been registered according to law, and in such terms as will give notice to third parties of the lien that exists on it.

This position will appear true on the slightest reflection. The object of registry laws, is the protection of good faith in those who, after the renderi g of the judgment, may wish to purchase the property of defendant, or find it necessary to acquire liens on it. Now if the language in which the recorded judgment is drawn up, does not indicate the person really condemned by it, but that fact can only be ascertained by considering the judgment in reference to the pleadings, it is evident that enregistering the judgment without the pleadings, gives no notice to the world, of the party whose property is affected by it. In the instance before us, the judgment would not have authorized an execution against the estate of John Curtis, unless taken in connexion with the allegations in the petition; and if it would not have authorised an execution, it cannot be considered as operating as notice to third parties, when recorded in another office. Persons looking there would have found nothing to inform them that there existed any lien on the property of the real defendant: nor any thing which even could have excited suspicion, or put them on en-

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quiry; for a judgment rendered against A. affords no intimation that if a further search is made in another place, it will be discovered that the judgment is against B. And even if it had, we are not prepared to say it was the duty of a third purchaser to look beyond the office of mortgages, that being the place where the law requires explicit notice should be given. But as the record here contained nothing to put the defendant on enquiry, that point need not be settled.

If it were held that purchasers were bound by judgments, registered as that now before us, then, on the same principle, the recorder of mortgages, who would certify according to the record in his office, would be liable to them, on an action, for the injury suffered through his error. To this action it would certainly be a good defence, that the judgment rendered gave him no information to the contrary. And it would not be a good answer to this defence, that if he had gone to the court where the judgment was recorded, and examined the pleadings, he would have ascertained that this decree was against a party in a representative capacity, and not in a personal. The law im-

poses no obligation on him to examine in the offices where the copy of the judgment can be found. It is sufficient for him to record it as presented, and he cannot be considered to err in not knowing that the mortgage was on property other than that which it purported to be. If the plaintiff had intended that the judgment should be rendered, and operate as a mortgage on the property of the deceased, the decree should have been expressed against the defendant as representative of the estate of John Curtis.

This opinion renders it unnecessary to examine the other questions raised in the cause, and it is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiffs, *Thomas* for the defendant.

WELLS vs. *HUNTER*.

When a judgment dissolving an injunction is given on a plea to the merits, it forms *res judicata* on the matters at issue.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff obtained an injunction against the defendant, to prevent the levy of

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Writing is not of the essence of a contract but the evidence of it.

an execution against a third person on a slave, part of the property of the plaintiff's ancestor, the injunction was dissolved on the plea of the general issue, the district court being of opinion that the law and evidence were in favor of the defendant.

The plaintiff even procured a deed of sale from M'Laughlin, to himself and his co. heirs, stating the slave had been purchased and paid for by their ancestor. On this injunction was obtained, and the defendant pleaded the general issue, and the *res judicata*, by the former suit. The injunction was dissolved and the plaintiff appealed.

It is objected here on his part, that the dissolution of an injunction, is not a judgment which forms a *res judicata*, and that the title given by M'Laughlin, since the dissolution of the first injunction, cannot be said to have been acted on.

A judgment dissolving an injunction is very often as one of non suit, and forms then no *res judicata*, but here the dissolution took place after a plea of the general issue, and the evidence was held to be in favor of the defendants.

The deed of M'Laughlin, obtained since

the dissolution of the first injunction is only an evidence of the contract by which the plaintiff's ancestor acquired a title to the slave; and the latter is in the hands of the heirs as assets of their ancestor's estate.

A contract is to be considered abstractedly, free from its form, the instrument which is the evidence of it; the one is the nut, the other the kernel. The writing is resorted to, in order to perpetuate the remembrance of the contract, but it is not of its essence. *Fiunt scripturae, ut quod actum est, per eas faciliter probari poterit, et sine his autem valet quod actum est, si habeat probationem. L. 4. ff. de pign.* 20, 1.

The civil code, 310, art. 241, requires every covenant, tending to dispose of a slave, to be written. But it does not avoid a covenant merely oral: since it provides, that if the covenant be denied, its existence shall not be proven by parol: a negative pregnant with the affirmative, that it may, by the admission of the party in the pleadings in his judicial confession.

Thus also the code 344, art. 2, requires all sales of slaves to be written, and declares oral ones *null*. But the immediate provision that

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no parol proof shall be received of an oral sale, and the preceding clause just commented on, shew that the nullity is not an absolute one, but a qualified one, in case no other proof be offered but by parol.

This construction gives effect to every word used by the legislature, and therefore is the soundest. It gives effect also to the contracts of men when admitted or duly proven *ut res magis valeat quam pereat.*

We conclude that the effect of the *res judicata* on the alleged title, cannot be avoided by the acquisition of new evidence in support of it, obtained since the present judgment.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Scott for the plaintiff, *Thomas* for the defendant.

CLARKE vs. *WRIGHT.*

A creditor who is not put on the *bilan*, is not bound by the proceedings.

When a negotiable note is the evidence of the

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This is an action against a sheriff for failing to arrest a defendant on a writ of

mesne process. The defence is, that at the time the process came into his hands, the defendant had filed, in the office of the clerk of the court, a petition praying that a meeting of his creditors might be called and he permitted to surrender his property; and that this petition was accompanied by an order of the judge, staying all proceedings against the person and property of the defendant.

There are no public officers who are placed in more delicate situations than sheriffs. The duties they have to perform frequently require them to decide, at their risk, questions on which perhaps the best legal advice they can resort to, will hesitate to pronounce positively. This case is an illustration of the truth of this remark. The creditor who brought the suit was not put on the *bilan*, though the debt due to him was. He was endorsee of the note, and the insolvent had no notice of the transfer. It has only been lately decided in this court, and that after much reflection, for the point was very doubtful, that persons who issue negotiable paper must take the risk, in case of insolvency, of ascertaining the *bona fide*

debt, it is the duty of the insolvent to find out the endorsee; putting the debt in the schedule in the name of the payee is not sufficient.

The orders generally granted on insolvent petitions, are erroneous—they should only direct stay of proceedings on the part of those creditors who are placed on the bilan.

A sheriff who neglects to arrest a defendant, at the suit of a creditor who is not placed on the bilan, is responsible in damages—but they will be only nominal.

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holder; and that their neglect in doing so, was not cured by placing the debt on their schedule in the name of the payee. *Vol.* 4, 383, *Herring* vs *Levy*.

The terms in which the orders on insolvents' petitions are drawn up by the judges of the first instance, tho' sanctioned by long usage, are not so precise and correct as could be desired. They, almost universally, direct that *all proceedings* be stayed against his person and property, tho' as it is well known they do not operate as a stay of *all* proceedings, but only the proceedings of those who may be placed on the bilan. It would be much better if they would direct, that all proceedings against the person of the insolvent, by the creditors placed on the schedule, should be stayed. Had that been done here, the action would, most probably, not have been heard of. The apparent inconsistency, however, between the words of the order, and its real effect cannot avail the defendant. It was his duty to know the law, and that the stay of proceedings could only have effect against those whose names were on the bilan.

But the question remains, to what extent

is the officer liable? The plaintiff, by his petition, seems to have understood that because the arrest was not made, he had a right to demand the whole amount of the debt from the sheriff. But we understand the law to be, that if the sheriff permits an escape on *mesne* process, his responsibility is limited to the loss actually sustained by the plaintiff. Now in the case before us it was, and could have been, but nominal, for the plaintiff might have been compelled to join in the *concurso*. It has already been settled in this court that if the insolvent be sued by a creditor, not on the bilan, his suit will be cumulated with the proceedings which the insolvent has commenced. In this case the debtor must have been discharged on application to the judge; the failure to arrest him, therefore, worked no injury to the petitioner, and he is only entitled to nominal damages for the mistake which the defendant committed. *Franklin Bank* vs. *Nolte & al. vol.* 4, 624. 10 *Martin* 687. 5 *ibid* 196.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

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be annulled, avoided and reversed, and that the plaintiff do recover of the defendant the sum of one dollar, with costs in both courts.

Oakley & *January* for the plaintiff, *Thomas* & *Boyce* for the defendant.

HAVARD vs. *STONE.*

APPEAL from the court of the sixth district.

The execution of a judgment cannot be enjoined, until a claim of the defendant sounding in damages be examined.

PORTER, J. delivered the opinion of the court. The defendant, a resident of Mississippi, obtained judgment against the plaintiff and was proceeding to carry it into execution, when the latter took out an attachment which he had levied on the debt due by himself, and then sued out a writ of injunction to prevent the defendant enforcing his judgment.

This attachment however, was superseded, by the defendant giving bond under the statute, to respond to any judgment which the plaintiff might obtain against him. On this fact being shewn, the judge *a quo* dissolved the injunction, and the plaintiff appealed.

The only error which the judge below committed was, in granting the injunction on the shewing of the plaintiff in his petition.

The claim was one sounding in damages for selling to him a diseased slave in another state of the union. The plaintiff in the original suit could not be delayed in the execution of his judgment until this demand was ascertained. It is only when the debt due is liquidated, or susceptible of immediate liquidation, that the defendant can offer it in compensation of an execution: the time given by the Spanish law is ten days. See the case of *Caldwell* vs. *Davies*, *Vol.* 2, 135, where this subject is examined at length.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Oakley for the plaintiff, *Bullard & Wilson* for the defendant.

PLEASANTS vs. *BOTTS & AL.*

APPEAL from the court of the fifth district.

An appeal will not be dismissed because the appeal bond is given to B & A, instead of A & B.

PORTER, J. delivered the opinion of the court. The plaintiff as surviving partner of the house of Pleasants and Charmly, sued Charles Caldwell and John Botts, who, he

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averred, were merchants trading under the firm of Caldwell and Botts; judgment was given against him in the inferior court, and he appealed.

A motion has been made in this court, to dismiss the appeal, because the bond is made payable to *Botts & Caldwell*, instead of *Caldwell & Botts*.

We do not think it should prevail. The bond is required by law, to secure the appellee from the damages he may sustain by the appellant bringing the cause here. The enquiry therefore in all cases like this must be, if the defendants in the suit should hereafter bring an action on the bond, could they recover? And the answer in the case certainly would be in the affirmative. The mistake was merely clerical, and on shewing that the bond was filed in the suit from which the appeal was taken, the obligors could not have successfully alleged, that it was not payable to the defendants.

The suit was brought on the record of a judgment rendered in a sister state, and the judge, being of opinion that it was not proved in the manner directed by the act of congress, nonsuited the plaintiff.

On examining the transcript, and the certificates which accompany it, we think the court below erred. The clerk states, that it is a true and complete transcript, and the judge certifies that this clerk was at that time the clerk of the co rt, and that the certificate is in due form. This was sufficient, and the cause must be remanded.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that this case be remanded to the district court, with directions to the judge, not to reject the transcript which accompanies the record in this case, on the ground that it has not been certified by law, and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Oakley for the plaintiff, *Boyce* for the defendant.

CRISWELL vs. *GASTER* & *AL.*

APPEAL from the court of the seventh district

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CRISWELL
vs
GASTER & AL.

Money paid on a horse race which was simulated and fraudulent, may be recovered back

And in an action for that purpose, it is not a good objection to the competency of a witness that he was also a better on the race.

MATTHEWS, J. delivered the opinion of the court. In this suit the plaintiff claims damages on account of a fraud practised on him in a horse race. He alleges in his petition that the defendants entered into a simulated and fraudulent contract to run a race between two horses, the relative speed of which had been previously ascertained, with a view of cheating and defrauding other persons who might be induced to bet on said race; that he did wager the sum of $320 with one of the original parties to the simulated agreement above stated, which was determined by the judges of the race to be lost, and was accordingly paid, and which he seeks to recover back in the present action, and also an equal sum which might have been won by him, if the race had been fairly run.

The cause was submitted to a jury in the court below, who, from their verdict, appear to have been fully convinced of the fraud alleged, and assessed damages in favor of the plaintiff to the amount, not only of the sum by him wrongfully paid, but also for that which he might have gained. Judgment being rendered in pursuance of the verdict, the defendants appealed. A bill of excep-

tions is found on the record to the competency of a witness who was also a better on the race, to a small amount, on the same side with the plaintiff. The judge *a quo* considered this as a circumstance which might affect his credit, but was not sufficient to render him incompetent. In this opinion we concur with the court below. A motion was made for a new trial, which was overruled. All the facts of the case coming up to this court, that proceeding in the cause need not be noticed.

As to the merits of the case, we think the jury erred in giving a verdict for more than the sum actually paid by the plaintiff. The judgment of the district court being in conformity thereto, is also erroneous. The aleatory contract was clearly simulated and feigned, and although intended to defraud, it could legally produce no effect; nothing could have been lost on it, and consequently nothing could be won. It might, perhaps, be assimilated to what, in jockey phrase, is called a drawn race, such as happens where the parties consent to annul their agreement to run, or when the horses prove to be of equal speed. It is true that the conduct of the defendants appears to have been immoral

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in the extreme, (if morality may be considered to have place in any shape in quarter races): but as the contract must be considered as void *ab initio*, the plaintiff is only entitled to recover back the money, by him paid without consideration and in error.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled und reversed: and it is further ordered, adjudged and decreed, that the plaintiff do recover from the defendants the sum of three hundred and twenty dollars, and that the appellee pay the costs of this appeal.

Thomas for the plaintiff, *Scott* for the defendants.

BUARD'S CURATOR vs. *BUARD'S HEIRS.*

The party who calls a witness, and examines him in chief, cannot afterwards object to his competency.

Compensation may be pleaded in case of insolveney, when the credit accrues before bankruptcy, and is unattended with suspicous circum tances.

APPEAL from the court of the sixth district.

MATTHEWS, J. delivered the opinion of the court. In this case the curator of the estate of Sylvester Buard, which became vacant in consequence of his legal heirs having refused to accept the inheritance, sues the heirs of his father to recover from them a certain sum of money, which is alleged to be owing to the estate of the person represented by the plain-

tiff, from the heirs of his father, on account of so much which he was entitled to share from his maternal estate, and which was received and retained by the father. The answer, in addition to a general denial, contains a plea of payment and also of compensation on the part of one of the defendants, Bossier. The case was submitted to a jury, who found for the plaintiff part of the sum by him claimed, and judgment being rendered in conformity with the verdict, the defendants appealed. Since the appeal, the appellee has suggested errors in the judgment of the district court, and prayed that it may be altered in his favor.

In the course of the trial below, Francois Bossier was introduced to prove or acknowledge his signature as a witness to an instrument in writing, by which the amount due from the father to the son, as heir to his mother, was ascertained and liquidated. The witness was sworn in chief, and the defendant commenced a cross examination, with a view of supporting his plea of payment, to which the counsel for the plaintiff objected, on the ground of incompetency in the witness as being an ascendant of some of the defendants, which objection was overruled by the

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district judge, who considered that it came too late, after the witness had been introduced by the plaintiff and sworn to testify in full. A bill of exceptions was taken to the opinion of the court, by which the defendants' counsel was allowed to pursue his examination of the witness, which comes up in the record, for the examination and decision of this court. The legal incompetency of the witness to testify either for or against the interest of his descendants is not denied: but we are of opinion that this exception was virtually waived by both parties to the suit, being a necessary consequence of receiving him without objection. There is little weight in the alleged necessity of the thing, on the part of the appellee: being wholly incompetent, his hand writing, or that of the obligor, in the instrument, might have been proven in the same manner as if he had been dead. We are, therefore, of opinion that the judge *a quo* did not err in permitting the cross-examination.

In support of the plea of payment, the defendants introduced evidence of debts due from Sylvester Buard, the son, to his father, and money paid by the latter for his use and

benefit, &c. which were allowed by the verdict of the jury. This, although not strictly a payment, operated as such in consequence of the effect it produced by compensation, and proof of it was properly allowed under the plea of payment. But it is contended on the part of the plaintiff, that in cases of vacant estates, and those accepted with the benefit of inventory, which may be assimilated to estates in failure, compensation does not of right take place. This is true when the credit accrues after bankruptcy, or is attended with suspicious circumstances, which lead to a belief of fraud intended against other creditors of the insolvent. In the present case it appears that the debts due from the son to the father, existed long before the death of the former, and consequently produced compensation before the opening of this succession, and so far extinguished the debt due by the latter to him. *See* 7 *Toullier, p. p.* 454 to 458.

The compensation set up on the part of Mrs. Bossier one of the defendants, was properly rejected, as the debt claimed appears to be in right of her husband. We believe the verdict and judgment of the court below to be correct.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Rost for the plaintiff, *Bullard* for the defendant.

STAFFORD vs. *STAFFORD.*

The court of probates has jurisdiction of applications for the interdiction of insane persons.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. This action was instituted to obtain an interdiction for insanity, in the parish court. It supported a plea to its jurisdiction, and its judgment was affirmed in the district court and the plaintiff has appealed to this.

We are of opinion the case is cognizable in the court of probates. It is true that the civil code 78, art. 5, declares that every interdiction shall be pronounced by the judge of the parish of the domicil or residence of the person to be interdicted. This judge is to appoint an administrator to protect the estate 'till judgment, and afterwards a curator.

The object of the legislature, here, was to define the parish in which the interdiction was to be provoked. The judge of that parish, in his capacity of judge of probates, ap-

points curators of vacant estates, absent heirs, minors and other persons. *Act of* 1820, *p.* 92.

The insanity which renders necessary the appointment of a curator, ought therefore to be ascertained by the judge of the parish, in that capacity in which he is to oversee the administration of the estate of the insane person, by a curator. It is, therefore, in his capacity of judge of probates, that he ought to be applied to, to pronounce the interdiction.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin & *Bullard* for the plaintiff, *Boyce* & *Thomas* for the defendant.

CLAY vs. *OAKLEY.*

APPEAL from the court of the sixth district.

In an action against an agent for endorsing a note without authority, proof must be given of notice of protest to him or to the principal ?

Depositing the notice in

MARTIN, J. delivered the opinion of the court. The plaintiff seeks to make the defendant liable, on his endorsement as agent of Bynum, because the endorsement was made without authority. The want of authority rendered the defendant liable, as if he had

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a post-office is not sufficient, if the endorser lives in the place where the post-office is situate. And if he lives out of the place, the notice is bad if directed to him as living in it.

endorsed the note as his own. His liability in such a case would have been dependant on the use of legal diligence on the part of the endorser, by demand, protest and *notice*. It becomes therefore the plaintiff in this case, to shew that he used this legal diligence. It is clear the defendant, as he endorsed in the name of Bynum, cannot complain that notice was given to the latter and not to himself; for if the plaintiff erred in considering Bynum as his endorser, the error proceeded from the act of the defendant; but if the endorsee gave no legal notice to any one, he cannot blame any one but himself, if by his latches, his endorser, who ever he was, was discharged.

We therefore conclude, that it behooves the plaintiff who sued as endorser, to shew that he did not discharge his endorser, but used legal diligence.

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The record shews that notice of the protest and non payment was deposited in the post office at Alexandria, directed to F. A. Bynum, at that place. Now Bynum dwelt either within or without that town: if he did without, the notice was not properly directed, and the plaintiff must fail. If Bynum resided in Alexandria, he was entitled to notice at his do-

micil, and nothing authorised its being left in any other house. It is therefore clear no legal notice was given, and the endorser of the note was thereby discharged.

The plaintiff is therefore, without a right of action against the defendant, for whether the latter correctly endorsed the note in Bynum's name, or improperly being without authority, the plaintiff suffers from his own negligence only.

Had notice been given to Bynum or the defendant, perhaps they might have taken such means, as might have led to payment by the maker of the note: the plaintiff by neglecting to give notice, took upon himself the risk of obtaining payment from the maker.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendant as in case of non suit, with costs in both courts.

Thomas for the plaintiff, *Oakley & January* for the defendant.

COX vs. *WILLIAMS.*

APPEAL from the court of the sixth district.

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An attorney may be called on by his client's adversary, to testify in the cause in which he is employed.

A payee and endorser of a note is a good witness to prove that he acted as agent for another in taking the note payable to himself.

PORTER, J. delivered the opinion of the court. The defendant is sued on his promissory note, which has been endorsed by the payee, to the plaintiff. The answer contains an averment, that the note was given on a consideration which has failed: and that this defence may be well set up against the petitioner, because the payee was his agent, and took the note for his use and benefit.

In support of these allegations, the defendant offered at the trial, the payee, as a witness. He was objected to on two grounds; first, because he had been employed by the plaintiff as his attorney in this suit; and second, because he was endorser. The judge held the first objection to be a good one, and rejected him, to which opinion the defendant excepted.

I. The contemporaneous construction of the statute, which directs that attorneys shall not give evidence in any case in which they have been employed, was, that attorneys were placed under the same disabilities as parties. The motives which induced the legislature to pass such a law were supposed to be, that attorneys could not be safely intrusted to testify for their clients: that under the influence of

professional zeal, they became in feeling, if not in interest, completely identified with those who employed them. It is not within our experience, that this law has ever been considered, to prevent one of the parties from calling for the testimony of his adversary's attorney. There can be no reason supposed why it should. On the contrary there are powerful considerations, flowing from a regard to an efficient administration of justice, why it should not. For in this way, the witness on whose knowledge the whole fortune of one of our citizens depended, might be disqualified by the act of the person against whom he was to testify. This is permitted by no system of laws that we have any acquaintance with. Nor can we believe, the legislature contemplated conferring any such power. When the terms in which a law is drawn up, lead us to a strict interpretation, to consequences contrary to common sense, and destructive of private right, it is our duty to construe them in such a way as will avoid these consequences. The *will* of the legislature is certainly to be obeyed, but the literal meaning of the words used, is only one way of ascertaining it. It must be sought also in the

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whole context, in the object of the law, in the evil to be remedied, and above all in the conviction sincerely entertained by this court, that the representatives of the people do not intend to violate first principles. If a party to a suit, could by any act deprive his adversary of his witness, he could on the same principle seize on his documentary evidence and retain it; and if the legislature could be supposed to have the intention to authorise such things, they might be supposed capable of enacting that the debtor should be discharged from his obligation; for we cannot see the difference between depriving a man of his property and depriving him of the evidence which establishes his right to it.

II. Nor do we think the circumstance of the witness being an endorser on the note, deprived the maker of his testimony. The rule relied on in support of the objection, is of modern date and not yet perfectly settled. Admitting it however in its whole extent, it does not reach this case, for the defendant did not introduce the witness to prove any thing by which an innocent endorsee could be injured, but to establish that the person by whom the suit is brought was in truth the payee, and

the witness his agent. If such were the facts of the case, there could be no question about what an endorser could prove, for the suit, though in the name of the endorsee, would really be one between the maker and payee, and as between them the consideration might be enquired into.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that this case be remanded to the district court with direction to the judge not to reject the payee and endorser of the note as a witness to prove that he acted as agent of the plaintiff, and that the note was given to him in that capacity. It is further ordered that the appellee pay the costs of this appeal.

Baldwin for the plaintiff, *Wilson, Scott, Bullard & Oakley* for the defendant.

STRONG vs. *MORGAN.*

APPEAL from the court of the seventh district.

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STRONG vs MORGAN.

A synallagmatic contract, tho' not made double, is good as a commencement of proof in writing.

PORTER, J. delivered the opinion of the court. This action was brought for work and labor done by the plaintiff for the defendant. On the trial the latter offered a written contract in evidence which had been signed by both parties. It was objected to as being a synallagmatic act under private signature, and had not been made double. The court sustained the objection and the defendant excepted.

The judge erred in this opinion. The act, though it was not a complete one, and did not produce the effect which it would have had, if made in as many originals as there were parties, was good as a commencement of proof in writing, and should have been received as such. *Ferguson & al.* vs. *Thomas & al. Vol.* 3, 75.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that this cause be remanded to the district court, with direction to the judge not to reject the contract entered into between the parties because it was not made double; and it is fur-

ther ordered, that the appellee pay the costs of this appeal.

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STRONG vs. MORGAN.

Downs for the plaintiff, *Thomas* for the defendant.

STAFFORD vs. *STAFFORD.*

APPEAL from the court of the sixth district.

The defendant cannot resist the plaintiff's claim for his the plaintiff's negro, and the hire, on the ground that there was no demand.

PORTER, J. delivered the opinion of the court. The plaintiff claims from the defendant a negro slave, and hire for the time he has been in his possession. The answer neither admits or denies the allegations in the petition, but avers, that no demand has ever been made for the slave, and that if he be on the plantation of the defendant, it is without his consent, and that the plaintiff might have taken him away.

The evidence fully sustains the allegations of the petition, and justifies the verdict given in the court below for the slave and the hire. The judgment rendered thereon was correct, and it is therefore ordered, adjudged and decreed, that it be affirmed with costs.

Thomas for the plaintiff, *Baldwin* for the defendant.

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WELLS' HEIRS vs. *BALDWIN.*

The purchaser of real estate by public act, cannot be affected by a previous alienation *sous seing privé*, which was not accepted by the person in whose favor it was made.

APPEAL from the court of the sixth district.

MATTHEWS, J. delivered the opinion of the court. In this case the plaintiffs claim an undivided fifth part of a certain tract of land described in their petition. Judgment was rendered against them in the court below, from which they appealed.

The evidence which was offered in support of their title, as it appears on record, is testimonial proof of the contents of an act passed before E. Meuillon, by which it appears that Miller & Fulton, under whom both parties to this suit claim title to the premises in dispute, acknowledged and agreed, that although they purchased the land in their individual names, it was bought for themselves and three other persons, one of whom is the ancestor of the appellants.

There is some contradiction in the testimony as to the manner in which the instrument from Miller and Fulton, to the ancestor of the plaintiffs, was executed: the weight of evidence, however, shews that it was not signed or accepted by any of the persons for whose benefit it was made.

There is a bill of exceptions to the admissibility of oral testimony to prove the contents of the written deed, which appears to have been lost or destroyed. Whether the loss was proved in such a manner as to authorise the introduction of testimony to prove its contents, need not be enquired into, because the act appears never to have been perfected by the acceptance or signature of the pretended partners of the purchasers, Miller and Fulton, in whom the whole legal title remained until they sold, conveyed and delivered the land to the defendants, who are vendees from them without notice of any former sale or transfer to any other persons: for the pretended transfer to the ancestor of the plaintiffs was no where to be found on record. Giving to the evidence of title, on the part of the appellants, the utmost force that a complete *sous seing prive* deed could have, (and the act under which they claim is clearly entitled to no higher dignity, as it does not appear even to have been placed on the records of a notary or any other officer) it could not avail them against the appellees, who, although they should be considered as second

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purchasers, are the first to whom tradition was made. It is, perhaps, true, that being represented as a copy of a deed passed before a commandant of the Spanish government, a violent presumption is raised that it was made in authentic form and that the original remained on record in the archives of that officer; but it is clear, from the whole evidence and all the circumstances of this case, that the original could not be found, or any record of it, at the time when the defendants purchased from Miller and Fulton. In relation to these purchasers, it ought to have no further effect than an act under private signature. On a full view of the entire case we are of opinion that the appellants have shewn no title to the land in dispute, against the appellees.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Scott for the plaintiffs, ***Baldwin*** for the defendants.

PARKINS & AL. vs. CAMPBELL & AL.

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When a debt is due at several instalments, and the transferee of the second causes the property to be seized & sold, the purchaser at the sale cannot be disturbed by an action at the suit of a creditor to whom the first instalment was assigned. How the proceeds of the sale should be divided *quere*.

APPEAL from the court of the sixth district.

MATTHEWS, J. delivered the opinion of the court. In this case the plaintiffs obtained an injunction, by which proceedings on an order of seizure were delayed, wherein the defendants were about to cause to be sold a tract of land claimed by said plaintiffs.

On hearing the cause, the injunction was made perpetual, from which the defendants appealed.

The facts of the case shew, that the appellants being indebted to the appellees, transferred to the former a debt, which the latter held on a third person, secured by mortgage on the land which they attempted to seize and sell as above stated. The claim transferred was a second instalment of the debt thus secured by mortgage, on which the mortgaged property was regularly seized and sold for the benefit of the transferees, was purchased by their agent and the title transferred to them, or one of them. Since this sale the order of seizure, or execution, complained of in the petition for an injunction, issued in favor of the appellants

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on a previous instalment, which was secured by the same act of mortgage, and which is perpetually enjoined by the judgment of the district court.

We are of opinion that the judgment thus rendered is correct.

The persons in whom the right to the first instalment remained, having taken no steps to enforce their claim, until after the second became due, and the mortgaged property was seized and sold under it, have lost their lien on said property, in the hands of third possessors. The sale under the mortgage destroyed entirely its force, and gave a complete title to the purchaser.

How the proceeds arising from such sale should be divided, or whether they be subject to division and partition between the owners of the different instalments secured by the hypothecation, are questions which do not occur in the present suit.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiffs, *Scott* for the defendants.

SOUTHWARD & AL. vs. BOWIE.

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An attachment may issue to compel the attendance of a witness without an affidavit of his materiality, where the issueing it will not delay the trial of the cause.

APPEAL from the court of the sixth district.

MARTIN, J delivered the opinion of the court. Our attention is drawn to a bill of exceptions to the opinion of the district judge, overruling the application of the plaintiff's counsel for process of attachment against a witness duly summoned, and who neglected to attend.

The court thought the attachment ought not to be granted, unless the plaintiff's attorney made an affidavit of the materiality of the witness.

We think the court erred. A party is not compelled to continue his cause, indeed he ought not, if his witness's attendance may be compelled by legal process. The client may be absent, and the materiality of the witness may be a fact to which the delicacy of the attorney prevents him to swear. The process of attachment may accelerate, but cannot delay the trial: for if it be ineffectual, the party is to entitle himself to a continuance, by the same affidavit, which would be required of him, if he did not apply for a process against the witness.

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When the witness resides, or is certain to be near the court house, the party may depend on the process of the court to bring him in, and neglect to attend and entitle himself to a continuance by his affidavit.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case be remanded for a new trial, with directions to the court, not to refuse a process of attachment against a witness, because the affidavit of his materiality is not made, and it is ordered, that the appellee pay costs in this court.

Boyce & Thomas for the plaintiffs, *Baldwin* for the defendant.

REYNOLDS vs. *THOMAS.*

APPEAL from the court of the sixth district.

Where the motion for a new trial is not shewn by the record to have been made before the judgment was signed, the cause will not be remanded, because that notice does not appear to have been acted on.

PORTER, J. delivered the opinion of the court. The defendant is sued on his promissory note, which has been endorsed by the payee to the plaintiff. The defence set up was, that the note which, on the face of it, purported to be due at sight, was by an agreement between the payee and the maker, payable

several months after; and that the petitioner had notice of this agreement.

The endorser was by an order of the court made a party to the suit, and in answer to an interrogatory propounded to him, he categorically denied that any such agreement had been entered into as that stated in the answer.

On this proof, the judge below necessarily gave judgment for the plaintiff: the defendant appealed.

In this court he has moved to have the cause remanded, on the ground that he made a motion for a new trial, which was not passed on by the judge below, and the district court was adjourned improperly, before that motion could be heard.

Nothing on the record enables us to say there is the least foundation for this application. The judgment which it is alleged was rendered out of court, is shewn by the transcript to have been given in open court. The motion for a new trial, does not appear to have been made within the time prescribed by law. The judgment is signed and dated of November term, and the motion is of the 4th December, we cannot therefore judicially know it was made within the time prescribed

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by the statute, which regulated our practice antecedent to the passage of the code. Every legal presumption is against it, for the judgment is *signed*, and the judge was prohibited from doing so, until the three days had elapsed for making a motion for a new trial. We must presume he did his duty, until the contrary is shewn. *Acts of* 1817, 32, 11.

We are unable to find any grounds to refuse the application of the plaintiff, that the judgment below should be affirmed with damages.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and ten per cent. damages on the amount of said judgment.

Baldwin for the plaintiff, *Thomas* for the defendant.

BENSON vs. *SHIPP*.

APPEAL from the court of the sixth district.

Surrender of an obligation will not produce novation if the evidence shew it was not intended to revive another debt in lieu of it.

PORTER, J. delivered the opinion of the court. The petitioner states that the defendant being indebted to him on a note executed at Natchez, in the state of Mississip

pi, bearing interest at ten per cent. placed sundry obligations in the hands of the plaintiff's attorney, to be collected by him, and that out of the funds he was to retain the sum of $823; that only a small sum has been collected on these obligations; and that the defendant still owes him the balance of the note.

The defendant avers, that the obligations alluded to were given in payment of his obligation, which was delivered up to him at the time the transaction was entered into. That the obligations placed by him in the hands of plaintiff's attorney, could have been collected if due diligence had been used, and that in no event is he liable, unless it be shewn that all legal and proper steps have been used to recover the debts received by the petitioner's agent.

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There was judgment in the court below for the plaintiff, and the defendant appealed.

The receipt of the attorney, after enumerating the obligations put into his hands, states, "of the above amount, when collected, the sum of $823 is to be paid over to Eden Benson, and the balance, when collected,

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to be accounted for to Shipp, Kay & Co. deducting five per cent. for collection."

Some time after this receipt, the note was given up, and the following counter letter taken:—

"We have put into the hands of H. A. Bullard certain notes, on some of which suits have been brought, out of the amount of which, when collected, he is to retain $823 for Eden Benson, to pay that balance *due on our note* of the 15th April, 1819.

(Signed) SHIPP, KAY & Co."

The defendant insists, that the surrendering the note is conclusive evidence that the attorney novated the debt, and that although it was not within his powers to do so, yet as the plaintiff has recognised and sanctioned the transaction by bringing suit on the agreement, it is as binding in him as if his agent had possessed full powers in the first instance.

The evidence does not prove a novation; neither the receipt of the attorney, nor the counter letter, signed by the defendant, raises a presumption of it. The attorney states, that he had received the notes from the firm of which the defendant was partner,

for collection, and that out of the money received from them, he was to pay the plaintiff. The counter letter declares that "*we* have put into the hands of H. A. Bullard certain notes, out of which, when collected, he is to retain $823 for Benson." To constitute novation, one debt must be given for another. In this case, if the plaintiff novated the debt, it must have been for obligations other than those mentioned in the evidence, for they remained the property of the partnership of which the defendant was member,—were to be collected for their benefit and at their expence.

Then, as to surrendering the obligation. This in an ordinary case would be sufficient proof that the obligation it evidences was discharged, but the circumstances under which it was delivered here destroy that presumption. It is shewn that nothing was received for it. The note was surrendered by the attorney, who was agent for both parties, on the presumption that he would receive enough from the obligations put into his hands for collection, to meet it. But there is no evidence the parties understood it was *paid*, on the contrary, the counter

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letter proves that there was a balance due, which was to be paid.

As to the allegation that there was negligence in collecting these debts. This may be so, but the plaintiff is not responsible for it, for the attorney was the agent of the defendant in making these collections.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Bullard for the plaintiff, *Thomas* for the defendant.

M'CRUMMEN vs. *M'CRUMMEN & AL.*

APPEAL from the court of the sixth district.

A post-office is not the proper place to deposit a notice of protest when the endorser lives in the same town or adjoining it

MARTIN, J. delivered the opinion of the court. The plaintiff sues as endorsee of a promissory note, which was duly protested. The notice was put by the parish judge in the post office at Alexandria, while the endorsee's residence was out of the limits of that town but within a few rods of the boundary.

A post office is a proper place of deposit for notices, that are to be conveyed by mail to some other post office, or perhaps to be left on

the road. But when the residence of the endorser is within the town or close on its borders, it is clear that the notice must be given to him there, as his opportunity of receiving it from the post office, is more distant and perhaps more precarious.

The absence of the endorsee from home is not a reason to delay notice till his return, because he is supposed to arrange his affairs in such a manner that they may be attended to while he is abroad.

This case differs very little, indeed not at all from that of *Clay* vs. *Oakley*, lately determined.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Thomas* for the defendants.

BYNUM vs. *ARMSTRONG*.

An agreement by which A *sells* cotton to B, on condition that the latter shall take it to another place, sell it, and pay over the proceeds to the creditors of the vender, is not a contract of sale.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The defendant is appellant from the judgment of the district court, which perpetuates

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an injunction, obtained by the plaintiff to prevent the sale of a quantity of cotton, on which the former had caused a *fi. fa.* against F. A. Bynum to be levied.

The plaintiff claims the cotton, as part of the estate of Parham T. Bynum, of which he is curator, as having been purchased by his estate from Francis A. Bynum, according to the following document.

"Articles of agreement made and entered into between Francis A. Bynum, and Parham T. Bynum, both of the parish of Rapides, witness, that F. A. B. has bargained, sold and delivered to P. T. B. and by these presents, sells, bargains, transfers and delivers to him, all his crop of cotton, which has been raised on his two plantations, the present year, the greater part of which is gathered, and some of it ginned and baled, and is contained in his gin and cotton house, on his upper plantation.

In consideration of which the said P. T. B. promises and obliges himself to pay to F. A. B. such price as he may obtain for it in New-Orleans, after deducting freight and charges of sale: first paying out of the said price a debt due by F. A. B in two judgments obtained against him by L. R. in the sixth

district court for the parish of Rapides, and in the next place paying a claim of W. M. as far as $4000, against F. A Bynum, and the balance of the price of said cotton to F. A. Bynum or his order."

The character of a contract is to be sought in the object the parties sought to accomplish, rather than in the appellation they gave it; in what is done, than in the words that are used.

Thus, there is no contract of sale, without a price in money, and if A. sell to B. a horse for a mule, which B. promises to deliver, there is no contract of sale, but one of exchange.

The object of the contract of sale is to make the vendee have the thing sold as his own, to give him a right to, an interest in it.

Here the intestate acquired no right nor interest in the cotton: he was authorised, and undertook to convey it to, and to sell it in, New-Orleans, and to pay the proceeds to the creditors of the owner and his order. The cotton was never at the risk of the intestate; had it been destroyed by fire, or sunk in the river, without his fault, the loss must have been his employe's F. A. B. *Res perit domino.*

The intestate incurred no other obligation

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than to use his best endeavors to convey the cotton to New-Orleans, sell it, and pay the price to F. A. B. This did not make the intestate an owner, for the cotton was not at his risk, and he was neither to have any benefit or sustain a loss, in case of a rise or fall in its value. The profits and risks were all F. A. B's. who never ceased to be the owner. The cotton was therefore properly seized as his property.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the injunction dissolved, the plaintiff paying costs in both courts.

Scott for the plaintiff, *Thomas* for the defendant.

STAFFORD vs. *STAFFORD.*

When no question of law arises in a case, the verdict is not disturbed, unless it appear manifestly erroneous.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff claims $10,150 for the use and labor of her slaves during eleven years, and for moneys received by the defendant from the sale of her land.

The defendant pleaded the general issue —that the plaintiff is his sister, and lived with him from the death of their father, in 1803, till 1814, and during that time was and still is under a mental incapacity, unable to take care of her affairs or herself—that he incurred great expense for her—that at the death of her father she had five slaves, now increased to fifteen or sixteen —that he was at great expense in raising the young ones and removing the whole, and the plaintiff, from S. Carolina to the territory of Mississippi and this state—that the slaves were demanded from him, but removed in 1816 to John Stafford's, with whom the plaintiff went to live—that a tract of land she had an interest in in South Carolina was exchanged for a bay mare, which the plaintiff used in her removal—that he does not owe any thing to the plaintiff, who, on the contrary, is indebted to him for sundry things furnished her and money spent for her support.

She obtained a verdict and judgment for $2100, and he appealed. A number of witnesses were heard, no questions of law appear to have arisen at the trial, and we

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are unable to say the jury came to an erroneous conclusion.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiff, *Baldwin* for the defendant.

HUNTER vs. *SMITH.*

The plaintiff may discontinue, or the court may order a dismissal.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. This case was remanded for a new trial, in September 1824, vol. 3, 109. The plaintiff, on the return of it, prayed leave to dismiss his suit, which was granted, and the defendant appealed.

The plaintiff's right to pray a discontinuance of his suit was recognised by this court in the case of *Petit* vs. *Gillet*. 5 *Martin* 20. And we have heard nothing that militates against it. The court may itself order a dismissal. *Part* 3, 22 3, 22, 9.

It is therefore ordered, adjudged and deceeed. that the judgment of the district court be affirmed with costs.

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Thomas for the plaintiff, *Baldwin* for the defendant.

MARTIN vs. *MARTIN'S HEIRS* & *AL.*

When a minor is absent from the state, service of citation in an action of partition may be made on his curator. And if duly represented in that action, the judgment is conclusive against him until set aside

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This is an action to recover from the heirs and sureties of a curator, the sum of $40,000, which it is alleged he received for the plaintiff, who was a minor.

The plea of *res judicata* which is offered as a part of the defence set up by the defendants, requires us to set out particularly the pleadings.

The petitioner states that he is one of the heirs at law of Abraham and Mary Martin, and as such was entitled to the sum of $40,000: that he was a minor from the death of his father and mother until the 20th November 1823, when he became of age. That J. M. Martin was appointed his curator, and received the sum of $40,000, in money, from the other heirs of A. & M. Martin: and in property, which, without any legal authority, and without the approbation of the petitioner, he purchased at the sale of the estate of his

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father and mother, and which he retained in possession until his death, and is still in possession of his heirs. That the petitioner was not assisted by a curator *ad litem* in the premises, that he utterly disclaims all such acts and doings on the part of his curator, and that in consequence thereof the said J. M. Martin became liable, on his bond, to pay the sum already stated.

The petition proceeds with an enumeration of the property left by the curator, on which the plaintiff avers that he has a mortgage, and concludes with a prayer that the heirs of J. M. Martin, his sureties, and the other persons who have acquired part of the mortgaged property may be cited; that judgment may be rendered against the former for the sum claimed; and against the latter, that the property which has come into their hands may be held subject to said judgment, and sold to satisfy the same.

The persons thus made defendants put in separate answers, according to their different rights, and the views which each entertained of the defence he had to the action. That which first appears on the record comes from one of the sureties.

1st. He pleads the general issue.

2d. That a regular classification of the estate and succession of John M. Martin was made by the judge of probates, of the parish of Rapides, at which the plaintiff was represented by his then curator *ad bona*, Robert Martin, who claimed for, and had allowed to the plaintiff, as a general privilege, the sum of dollars, which order is yet in force and unrepealed, and operates as the thing adjudged between the estate and the heirs of the said John M. Martin and the plaintiff.

3d That the petitioner has no claim in this suit, because a suit was brought in the probate court of the parish of Rapides, by the representatives of Anna Terrill, one of the heirs of Abraham and Mary Martin, for a partition of the succession of the said Abraham and Mary: and a settlement of accounts among the heirs. That in this suit the plaintiff, then a minor, was duly represented by J. S. Johnston, his curator *ad litem* specially appointed for that purpose, and a decree was given therein, which decree was appealed from to the district court, and there a final judgment was rendered, by which it appears

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that the petitioner, has received more than his portion of the estate of Abraham and Mary Martin, and which decree being unreversed forms *res judicata*, and precludes the plaintiff from recovery in this suit.

We will consider the last of these pleas first, and in order to ascertain whether it has the force and effect contended for, it is necessary to recur to the pleadings in the suit wherein the judgment offered in bar was rendered.

The plaintiffs in that case were the representatives of one of the heirs of Abraham and Mary Martin. In their petition they state, that by an order of the district court of the parish of Rapides, the parish judge of said parish was directed to proceed to the sale of the succession of the said Abraham and Mary; that pursuant to said decree, the whole of the estate was sold; and that, notwithstanding the sale, no final partition of the succession, or settlement of accounts among the heirs had yet been made. That at the sale, the property was principally bought by the heirs or their representatives; and that some of them had bought greatly over their proportion, and were in arrears to others.

They conclude by praying, that a partition of the estate may be made; that the heirs may be cited; that a curator ad litem may be appointed to the present plaintiff, and that the court would proceed "to the final partition of said estate among the heirs, and to a full, complete and final settlement of accounts between them; and that the court will decree to each, such sum as may be found due upon said settlement and partition.

The parties appeared in the court of probates, and the judge proceeding to make a settlement, charged each of the heirs with the amount purchased at the sale of the succession of Abraham and Mary Martin; among these charges, the present plaintiff is credited with $3[illegible],011, 50 cents, *the amount bought by him*, and his share is stated to be $34,146, 19 cents.

On the appeal to the district court, the same principles were adopted as the basis of its judgment, and the judge proceeds to state, that in order to a final settlement of the estate of Abraham and Mary Martin, judgment should be given in the manner therein stated. It is unnecessary to set out any part of it except

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that which decrees to the petitioner the sum of $2159, 16 cents.

The question then is, whether with this judgment standing unreversed, the plaintiff can recover in the present action?

Assuming for the moment, that it was regularly rendered according to law, our first inquiry must be what were its effects on the minor. Before going into this question however, it is necessary to state, that the heirs of J. M. Martin, who are sued now, were parties to the suit, and that their rights were pronounced on, as well as those of the coheirs.

We have already seen that the avowed object of the action, was to obtain a partition and final settlement of the estate of Abraham and Mary Martin. This estate then consisted of the debts due to it from the sale of the property, and the greater proportion of these debts were due by the heirs themselves.

In making the partition the minor is charged with purchases to a large amount. Now the consequence of this most clearly was, to make him *owner of the property* for the price of which he was debited, and until that judgment is reversed *he remains so.* The purchase by his curator, confirmed by a judg-

ment of the court, renders him to every purpose the proprietor of it. Nor can the consequences which result from these acts, be evaded by the argument urged by the counsel, that the legality of that purchase did not come in question in that suit. It came immediately and directly in question; for if the purchase had not been decreed to be legal, or admitted to be such by the curator, the judgment must necessarily have been in favor of the plaintiff for his whole share of the estate, instead of the sum of $2159, which was decreed to him.

Having thus ascertained in what relation the plaintiff stands to this judgment, and his rights under it, we proceed to inquire what is asked for in the present action. The petitioner states, that the purchases made for him at the sale of the estate of his father and mother, were contrary to law, that he disclaims them, and that he is entitled to have judgment against the heirs and representatives of his curator for the amount of said purchases.

If that prayer was acceded to, these proceedings, in relation to the rights of the minor, would present very singular features. There would be a judgment of a court of competent jurisdiction, deciding that he was the owner

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of the property. There would be another which leaving that judgment unreversed, would declare that he is entitled to the price of it. Now, this cannot be, and unless we shall find on further enquiry that the first judgment is absolutely, not relatively, null and void, we are perfectly clear, the plaintiff cannot recover in this action.

The plaintiff contends it was absolutely null, and he has relied on the principle, that unless proceedings against minors are conducted according to the legal formalities established for their protection, that they have a right to pass them by as if they did not exist, and sue at once to enforce any claim which they possessed anterior to these proceedings having taken place

It may perhaps be doubted whether the principle relied on, extends to the decrees of a court of justice rendered contradictorily with other parties, whether it does not stand as *res judicata* until appealed from, or set aside by an action of nullity. But we do not find it necessary to go into that question.

It is shewn here, that at the time these proceedings took place in the court of probates, the minor was absent from the state: and

that his curator *ad bona* being also a party to them, a curator *ad litem* was appointed to defend his interest. This curator *ad litem* appeared and assisted at all the proceedings, and we presume, as the contrary is neither alleged or proved, that he discharged his duty faithfully.

But that attendance is contended to be irregular and illegal, because the law requires the minor to be cited; and that it is only after he is cited, and appears, that a curator *ad litem* can be appointed to assist him.

If this position be correct, then it must follow that no suit can be commenced against a minor who is absent; and it will also follow that co heirs, and co-proprietors, of an undivided thing, may be obliged to remain owners in common, although the law says they shall not;—that any of them, *of age, or minors*, can compel the others to a partition of the estate which they hold jointly. *C. Code* 184, *art.* 150.

We think where the minor is absent, that *ex necessitate*, service must be made on the curator, otherwise the rights of persons of age would be suspended by his absence, and his is not one of the privileges which the

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law accords to minors. The provisions of the civil code which treat of the subject of partition, in contemplating the case of absentees, and providing for it, make no difference between those under, and those f full age. In treating of the curatorship of absent persons, it does not distinguish; and the laws of the Partidas, tho' not expressly legislating for this very case, in their spirit and intent most evidently sanction the course that was pursued here. *C. Code, tit.* 3, *cap.* 1, *page* 16. *ibid, cap.* 8, 184. *Partidas* 3, *tit.* 2, *laws* 7, 11, & 12.

On the best view, then, we can take of the whole matter, we think the minor was legally represented in the suit in the probate court, and that, of course, the sentence is binding on him, until it is reversed. *Cur Phillip, juicio civil, verbo sentencia,* §18, *no.* 10.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that there be judgment against the plaintiff, as in case of nonsuit, with costs in both courts.

Bullard for the plaintiff—*Thomas, Boyce, Rost* and *Wilson* for the defendants.

NORWOOD vs. GREEN & AL.

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The copy of a copy is not good evidence without accounting for the absence of better proof

APPEAL from the court of the sixth district.

MATTHEWS, J. delivered the opinion of the court. In this case the plaintiffs sue to recover certain slaves described in their petition. They obtained judgment in the court below, from which the defendants appealed.

The evidence of title offered on the part of the appellees, is the copy of a bill of sale said to have been executed by John W yche to their ancestor, by which the property in dispute was regularly conveyed to him, and oral testimony of the contents of the original of this instrument. The copy which was admitted in evidence is taken from the records of Burke county, in the state of Georgia; being certified in conformity with the provisions of the act of Congress for such cases. An objection was made, on the part of the defendants, to its admissibility, on the ground of its being the copy of a copy, which the court below overruled, and a bill of exceptions appears on the record to that effect. We are of opinion that it was properly received, under the certificate made in pursuance of the act of congress; leaving its legal effect on the

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rights and claims of the parties, uninfluenced by its reception.

As the laws of Georgia have not been shewn or proven to the court, the effects of an instrument thus circumstanced must be ascertained in reference to the *leges fori*. According to our laws, the recording of an act under private signature, unless acknowledged by the parties to it before the proper recording officer, gives no additional force or effect to the original instrument; and a copy taken from such a record would not be legal or conclusive evidence of the contents of the original. We are, therefore, of opinion that the copy, offered by the plaintiffs, of the bill of sale taken from the records of Burke county in Georgia, does not make out the title to the slaves claimed in the present action. Neither does this copy prove the genuineness of the original, altho' admitted to record on the affidavit of a subscribing witness to it; for this is ex parte evidence, and ought not to be allowed to injure the rights of the defendants.

Admitting the loss of the deed of sale to have been proven in such a manner as to authorise testimonial proof of its contents, we believe that the plaintiffs have failed entirely

to prove its truth and genuineness. There is not one witness who says that he ever saw it and knew the hand writing of the subscribers. Why proof to this effect has not been obtained from the subscribing witness, is not accounted for; and until the impossibility of procuring his testimony be shewn, it is doubtful whether inferior proof ought to be admitted. We conclude, that the plaintiffs have not made out their case, and therefore this case is similar to that of *Bradford's Heirs* vs. *Calvit*, 5 *Martin*, 662.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, there be judgment entered for the defendants as in case of nonsuit, with costs in both courts.

Thomas & *Scott* for the plaintiff, *Bullard* for the defendant.

HUNTER vs. *SMITH.*

The defendant may offer in evidence his own answers to interrogatories propounded to him by the plaintiff in a former suit.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the

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court. This case is before us on a bill of exceptions to the opinion of the district court, in refusing leave to the defendant to avail himself of his answer to certain interrogatories put him by the plaintiff in a former suit between the parties, which was discontinued.

The district court in our opinion erred.

The defendant has an undoubted right to avail himself of his own answer to the plaintiff's interrogatories, and such answer is a legal piece of evidence which may be used by either party. *Berthole* vs. *Mace*, 5 *Martin*, 592.

The legislature has declared that such an answer is evidence in favor of the party answering, unless contradicted by positive literal proof or two witnesses. *Civil Code*, 316, *art.* 263.

Can the plaintiff deprive the defendant of this undoubted right to use the answer in evidence, by dismissing his suit and recommencing it.

The defendants may give in evidence the record of a former suit, between the parties, although it was dismissed. *Bore* vs. *Quierry's Ex'rs.* 4 *Martin*, 545. Yet the suit was

dismissed, not by the plaintiff's sole act, but upon an agreement between the parties.

The record of a suit is evidence, although the proceedings were not continued, 'till judgment. *Barlow* vs. *Dupuy*, 3 *vol.* 442.

A party cannot deprive his adversary of any piece of evidence, which he may incautiously furnish.

Thus we have held, a defendant cannot amend his answer by withdrawing an admission he has made, *Vavasseur* vs. *Bayon*, 11 *Martin*, 639, and that a plaintiff has no right to withdraw his answer to the defendant's interrogatories, although *there* it was objected to. *Posten* vs. *Adams*, 5 *Martin*, 272.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded for trial, with directions to the judge to permit the defendant to read in evidence his answer to the interrogatories put to him by the plaintiff, in the former suit, and it is ordered that the plaintiff and appellee pay costs in this court.

Thomas for the plaintiff, *Baldwin* for the defendant.

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THOMAS vs. *CALLIHAN'S HEIRS.*

The credits of a defendant may be seized in execution.

The recording of a transfer of a debt in the office of the parish judge, does not operate as a notice to third persons

APPEAL from the court of the sixth district.

MATTHEWS, J. delivered the opinion of the court. In this case the plaintiff sues to have a judgment made executory against the heirs of the person against whom it had been rendered.

The facts of the case, which appear important in coming to a just decision on the questions of law contained in it, are as follows:—John Stafford obtained a judgment against the ancestor of the defendants, which he assigned and transferred to the plaintiff, and which together with the agreement of transfer, was recorded in the office of the parish judge; Leroy Stafford obtained a judgment against the assignor, and caused the interest of the latter in the judgment against Callihan, to be levied on and sold to satisfy his judgment, purchased himself at the sheriff's sale, and has transferred the right which he has thereby acquired to the appellants for a valuable consideration. The transfer from J. Stafford to the appellee was previous to the seizure and sale under Leroy's judgment.

Out of these facts two questions of law arise. The first relates to the legality of

seizing in execution credits or choses in action of a debtor. The second has reference to the notice which the law requires to be given in a transfer of debts, so as to bind third persons.

The first of these questions depends on a general principle of law, and has been settled in the affirmative by a decision of the court, reported in 2 *Vol.* 616. It is true that some alteration has been made, restricting the right of plaintiffs in execution, by an act of the legislature subsequently passed; but this law has not produced any change which can affect the rights of the parties to the present suit.

In regard to the question of notice, the plaintiff relies principally, if not solely, on the circumstance of having caused to be recorded the judgment and act of transfer, in the office of the parish judge, previous to the levy made on it by Leroy Stafford under his judgment against the transferror. We are of opinion, that this recording was not such notice to the debtors as is required by law.

It is not a record of an act required to be recorded, for the purpose of warning or notifying third persons, whose interests might be affected by it. The notice necessary in the as-

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signment of debts, not regularly negotiable, according to law merchant, may be fairly assimilated to the notice which must be given to endorsers of promissory notes and drawers of bills of exchange; and, although the same exactness and promptitude may not be required in the former case as in the latter, yet to affect the rights of third persons, personal notice or something equivalent must be given, and proven in the event of any contest on the subject; which we think has not been done in the present case.

It is therefore ordered, adjudged and decreed, that the judgment of the court below, be avoided, reversed and annulled, and it is further ordered, adjudged and decreed, that judgment be entered for the defendants and appellants, as in case of nonsuit, with costs in both courts.

Rost for the plaintiff, *Baldwin* for the defendants.

JOHNSON vs. *KIRKLAND.*

The proces verbal of the probate of a will is void, if it does not state, "that the will was read in an audible and distinct voice to the witnesses and bystanders."

APPEAL from the court of probates of the parish of Catahoula.

MATTHEWS, J. delivered the opinion of

the court. In this case the plaintiff claims, as testamentary heir or universal legatee of his wife, an undivided portion of her father's estate; which claim is resisted by the curator of that succession: and the probate judge having decided in favor of the legatee, the present appeal was taken in behalf of the surviving heirs of the ancestor of the testatrix.

Two principal grounds of opposition are made to the appellee's right to recover: 1st. That the will under which he claims was not made in pursuance of the formalities required by law. 2d. That its probate was illegally made.

We will first investigate the last of these objections: for the provisions of a testament cannot be carried into effect until its execution is regularly ordered by a court of probates.

The code of practice, under which the will relied on by the plaintiff in the present case was attempted to be proven, is specific as to the matters which must be contained in the process verbal of the probate of a will. One of these is, that it should recite the "reading of the will, in an audible and

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distinct voice, to the witnesses and other persons present." Whether this be, or be not, a wise provision of law, is not for us to enquire: it is an expression of legislative will, which we, as judges, are bound to obey and cause to be enforced. The evidence of the probate of a will without such recitation in the process verbal, is not according to law, and is therefore void and of no effect against persons who have a right to oppose its execution, and who do make opposition, as is done in the present case. In consequence of this defect in the probate of the will of Mrs. Johnson, the testamentary executor and legatee cannot legally cause its dispositions to be carried into effect.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be avoided, reversed and annulled: and it is further ordered, that there be judgment entered for the appellant, as in case of nonsuit, with costs in both courts.

Thomas for the plaintiff, *Scott* for the defendant.

BAKEWELL vs. *COE & AL.*

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APPEAL from the court of the sixth district.

The supreme court cannot act on a case in which the value of the matter in dispute is below 300 dollars.

PORTER, J. delivered the opinion of the court. The petitioner claims a kitchen, built on a lot belonging to him, which he avers to be worth $150, and also damages to the amount of $50, which he alleges to have sustained by the defendant's having attempted to seize and sell it.

From these allegations it appears that the whole matter in contest, between the parties, is two hundred dollars, and to give this court jurisdiction, it must exceed three hundred. *Const. art.* 4, § 1.

It is therefore ordered, adjudged and decreed, that this appeal be dismissed, with cos s.

Deblieux for the plaintiff, *Rost* for the defendants.

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If the mortgaged premises are rendered less valuable by the acts of a third possessor, he will be responsible to them ortg gee

Erecting works on a ...m of water... ...h ter, by which a mill previously placed there is prevented working, is illegal.

And it is immaterial wh...her the obs...uction is created by pre...ting the stream from descending, or by throwing the water back on the ...d mill, so that it cannot work.

BOATNER vs. HENDERSON & AL.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The defendants were owners of two tracts of land, situated on a small water course in the parish of ...apides. The upper one was acquired by them by purchase, and at the ...me they bought it was subject to a mor'gage in fa...r of the present plaintiff. On the premises was erected a grist and saw mill, and the land is stated and proven to be of no value except for a mill seat.

The plaintiff not receiving payment of his debt, proceeded, by an action of mortgage, to have his lien carried into effect. While these proceedings were pending, the defendants commenced constructing a dam and a mill on the lower tract owned by them, and the very day, or the day after, the mortgaged premises were adjudged to the plaintiff, who became the purchaser Under the sale made at his own instance, they finished the construction of the dam.

The new works were erected so near to

the old ones, that it was found that the water collected in the dam rose to such a height that it completely impeded the use of the mill originally placed on the mortgaged premises. Upon this fact being ascertained, the plaintiff commenced the present action, in which he stated that these new works had been erected with the intention to injure those belonging to the petitioner—that he had sustained damage, in consequence thereof, to the amount of $10,000, and he prayed that he might have judgment for these damages, and that the works erected by the defendants might be abated.

The defendants pleaded that the plaintiff had shewn no cause of action—that they had a right to erect a mill and dam on their own land, and that the plaintiff purchased with a full knowledge of these obstructions.

The cause was submitted to a jury in the court below, who found a verdict in favor of the plaintiffs for $1,000, which verdict the court confirmed by their judgment, and further decreed, that the works erected by the defendants should be abolished.

The first question in the case is, whether the defendant, having purchased the mort-

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gaged premises, did not acquire a right to make any change he pleased in the buildings erected thereon? And we are of opinion his right to do so was undoubted, provided he did not diminish the value of the property. On this subject we have an express provision of law. "The deterioration which proceeds from the deed or neglect of the third possessor, to the prejudice of the creditors who have a privilege or mortgage, gives rise against the former to an action of indemnification." *C. Code* 462, *art.* 48.

The second is, whether the defendant had not a right to erect the mill, on his own land, whether it injured that of his neighbor or not? or, as the case was put at the bar, whether he had not the same authority to place works of this description on his land, as the plaintiff had to erect them on the adjoining soil, which was his property?

It is a general principle of law, that owners may use their property as they please, wtth the exception that they do no injury to others. *Sic tuum utere, ut alium non ledas.* But it would seem that this obligation ought not to be increased by the circumstance of others having *previously* commenced using

their property in such a way, as that the purposes to which they have applied it conflict with mine. Our code, however, appears to limit the right of ownership in this way, and in its provisions on this head, it distinguishes between works which *damage* the buildings of a neighbor, and those which produce an *inconvenience*, declaring the first to be illegal, and the other, nothing but the exercise of those rights which appertain to the ownership of property. *C. C.* 136, 16.

C. C. 746

In this case, the injury complained of is the erection of a dam, by which a reflux of water is created, so that the plaintiff cannot use his mill as formerly. Whether this be one of those acts by which an *inconvenience* would be produced, or a *damage* inflicted, might, perhaps, be doubted, though it would seem to belong to the latter class. But on this subject we have a positive law of the *partidas*, which declares that a man cannot erect a mill near another, so as to obstruct the current of water to that previously erected. It is true this law contemplates only the case of an injury done by preventing the water from descending, but the injury is the same where the water is thrown

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back. The object of the law was, to protect old works of this kind from being impeded in their operation by the erection of new ones; and whether this is done by obstructing the current so that no water can reach the wheel from above, or by sending so much water back on it from below, as that the mill cannot be used, is a difference but in name, and we have no doubt the prohibition extends to the one act, as well as the other. *Par.* 3, *tit.* 32, *law* 18.

The last point made in the cause is, that the damages are excessive. The jury and the judge below have thought they were not, and we do not think the case shews them so clearly so, as to authorise us to disturb the verdict. The property of the plaintiff is proved to be of no use but for a mill seat, and for that purpose to be considered of great value, if we may judge by the high prices paid for it by the persons through whom title has descended to the petitioner. From the time of the obstruction, up to the rendering the verdict, fifteen or sixteen months had elapsed, and we are unable to say the jury erred in considering that the

use of the property was not worth $1000 for that space of time.

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BEATTIE vs. HENDERSON & al.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Scott & Thomas for the plaintiff, *Wilson & Johnston* for the defendants.

ROST vs. *ST. FRANCIS'S CHURCH.*

APPEAL from the court of the sixth district.

The appellant has three judicial days after the return day, to file his appeal.

No change can be made in the pleadings, without leave of the court or consent of the opposite party.

MARTIN, J. delivered the opinion of the court. The plaintiff and appellee prays that the appeal may be dismissed, because it was returnable to the first Monday of October, 1825, and the transcript was not filed into the clerk's office till the 14th of that month.

The October term, 1825, entirely failed, two of the judges having been prevented by indisposition from meeting the third.

Admitting that the transcript of the record must be filed on the return day, into the clerk's office, whether that be a judicial day or not, *Code of Practice*, 587; the transcript in

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this case was filed before the expiration of the three days of grace, which the law grants to the appellant in filing the transcript, and during which he may shew that he was by some accident not within his control, prevented from filing his transcript, and before the expiration of which the clerk is forbidden to certify that the transcript is not filed. *Id.* 589, 883.

Those days must be *judicial* days, for on no other has the appellant the chance of shewing that he is not in fault.

As the certificate that the transcript is not filed, enables the appellee to have the judgment executed, and prevents the appellant from obtaining a new appeal. *Id.* 594, the latter must have the opportunity of shewing cause against the issuing of the certificate.

We notice on the record a bill of exceptions taken by the counsel of the defendants and appellants, on overruling their motion to have a supplemental or amended petition, which the plaintiff had filed without leave, rejected.

On this point the opinion of this court is with the defendants. Neither party can make any alteration or change in the pleadings, without the consent of his adversary, or leave of the

court. Thus in the case of *Robinson & al.* vs. *Williams*, in which the plaintiff complained that the district court had acted on an amendment filed, without leave, by the defendant to the answer, we reversed the judgment of the district court, and remanded the case with directions to the judge not to admit special matter as evidence of the plaintiff's claim under this amended answer, 3 *vol.* 665.

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Rost vs. St Francis' church.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, the verdict set aside, and the case remanded, with directions to the judge, absolutely to disregard and cause to be disregarded the supplemental or amended petition of the plaintiff and appellee, and it is ordered that he pay costs in this court.

Rost for the plaintiff, *Baldwin & Deblieux* for the defendant.

KING & AL. vs. *HAVARD.*

A debtor cannot be compelled to pay several transferees to whom the creditor may have assigned separate portions of the debt.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The petition states that Garriot hav-

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KING & AL. vs HAVARD.

ing obtained a judgment against the defendants, for $800 and interest, assigned $300 of it to Holloway, $150 to the plaintiffs, King and Beatty, and $40 to the plaintiff, Thomas; wherefore judgment is prayed against the defendant in favor of Beatty and King for $450, they alleging themselves to be the transferees of Holloway, and $40 in favor of Thomas.

The defendant pleaded the general issue and the indivisibility of Garriot's claim against him, compensation, &c. The plaintiffs had judgment, and the defendant appealed.

There is evidence, that after the assignment to Holloway, Paull called on the defendant for payment, and he said he would pay, although he would lose so much money, and that he would settle with King & Beatty.

That a debtor cannot be compelled to pay his debt to a number of transferees, among whom it may have suited the convenience of his creditor to distribute it, results from his right to resist his claim for partial payments: for the protection the law affords to the debtor in this respect, if the creditor might do indirectly what he is forbidden to do directly, by

transferring parcels of his claim to sundry persons would be nugatory.

El acreedor no puede pedir, ni cobrar, la deuda en parte, contra la voluntad del deudor. *Cur. Phil. Comm. Terr.* 22.

Le creancier ne peut forcer le debiteur a payer par parties. *Dumoulin, de dividuo et individuo, n.* 6 & 7. 6 *Toullier* 776, 777.

The district court, in our opinion, erred in coercing payment from the defendant by parcels.

As the transfer to Holliday was approved of by the defendant, and he promised to pay, he must be bound by his assent to the severance of the sum transferred to Holliday from the claim of Garriot.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; and that there be judgment against the defendant in favor of King and Beattie, for three hundred dollars, with interest from the inception of the suit; and that there be judgment against Thomas. The appellees paying costs in this court, and the defendant below.

Thomas for the plaintiff.—*Oakley* for the defendant.

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BULLARD vs *WILSON.*

The plaintiff, as endorsee, sues the first endorser, who pleaded the general issue, and that the maker of the note obtained an accommodation on it in bank—that the note was not *paid* by the plaintiff, but the debt of which it is the evidence, was extinguished by novation, the bank having received in exchange another note for the amount of the one on which the maker might, according to agreement, have obtained a renewal—that the plaintiff is not the owner of the note sued on—that the defendant received no consideration for his endorsement, nor any notice of protest.

Whether the endorsee take up a note by payment or by novation, his recourse against the endorser is the same

A witness swearing that he had no recollection of giving the notice of a protest, except from the memorandum on the back of it, but that he had no doubt he had given it, or he would not have made such a memorandum, is legal proof that the notice was given

There was judgment against him, and he appealed.

The protest was produced, and the signatures of the makers and all the endorsers anterior to the plaintiff, were proven.

The cashier deposed that the maker of the note had accommodations in bank to a large amount, for which various notes were given, and the debt was gradually reduced, after several renewals, to the sum for which the note sued on, was given—several sums from diffe-

rent loans being consolidated. At the maturity of this note, the defendant declined farther endorsements, and the plaintiff took it up after protest, by paying the proportion required on the renewal, and giving his own note for the balance. The proceeds of this last note were placed to the plaintiff's credit, and he gave a check for the whole amount of the note sued on, which was surrendered to him by the witness—who would not have paid the proceeds of the note last discounted, to the plaintiff, while he stood debtor on his endorsement, if the money had not been called for to pay the protested note.

The parish judge's memorandum of his having given the protest to the defendant in person, was on the back of the protest, and he deposed he had no recollection of giving it, but he had no doubt of his having given it, as he never made such a memorandum without having given the notice.

The endorsement of the note by the defendant to Thomas, and by Thomas to the plaintiff, are proven—so is the protest, and the payment of the note by the plaintiff.

There is as good evidence of the notice as is possible to be expected. A notary who

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daily protests and gives notice of the protest of a great number of notes, cannot possibly be able, at a distance of time, to recollect the very day he gave a particular notice, unless, immediately after he gave it, he made a memorandum of it; and it is from the information which his memorandum recalls, that he can satisfactorily establish either the day, the place, or the person whom he notifies.

In this case, therefore, the notice is duly proven. *See Alton & al.* vs. *Trimble & al.* 4 *Bibb*, 22.

There was no novation of the debt of the maker of the note, nor of the defendant.

The plaintiff, being bound to pay the amount of the note, after protest and notice, discounted his own note, and paid its proceeds, and another sum of money to discharge his debt to the bank and acquire a right to his reimbursement, on the maker and the anterior endorsers. Whether he novated or paid his own debt is immaterial as by either way he was subrogated to the rights of the bank.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court be affirmed with costs.

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BULLARD vs. WILSON.

Bullard for the plaintiff, *Wilson* for the defendant.

WHITE vs. *CUMMING.*

In a hard case the court will not mulct a defendant in damages.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The defendant states the note he is sued on was given for the price of a negro boy, sold him by the plaintiff; who represented him as very healthy and a valuable field hand, while "he is on the contrary, and ever since he purchased him has been sickly, languid and stupid, and so much addicted to stealing, as to be a constant damage, and is unfit for the purpose for which he was intended." He concludes with a prayer for the rescission of the sale, or a diminution of the price.

The plaintiff being interrogated on oath, by the defendant, declared the note sued on was given for a part of the price of the slave mentioned in the answer, and the balance of the price, two hundred dollars, was paid him by

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the defendant; that he, the plaintiff, did not most particularly state to the defendant that the slave was strictly honest, remarkably healthy, and a fine field hand; the slave was never before the purchase in the possession of the defendant.

The plaintiff had judgment and the defendant appealed.

The statement of facts shews that

Bray deposed, that when he first saw the slave, the defendant and his wife says he was unwell. He was purchased in the summer, and was sent to the plantation of the witness in the fall. He was very much swollen.—The witness first saw him two or three weeks after he was bought. The slave *always, at times* appeared subject to swelling. He is lazy and indolent, more so than any of his age the witness ever saw, the witness would not keep him for his victuals. He is stout and strong and looks tolerably well.

Dr Sebly deposed the slave was brought in four or five weeks ago considerably swollen, in the belly, face and eyes He bears old marks of frequent bleedings. The witness cannot tell whether his disease be ancient or recent; but thinks it is an incipient dropsy,

The slave is now better. A dropsical state of the system is not easily removed, but the cure is easier in young than in old persons.

The defendant has failed in establishing a redhibitory defect, and was properly refused relief, altho' his bargain appears a hard one, but we do not think ourselves bound to mulct him in damages.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs in both courts.

Thomas for the plaintiff, *Scott* for the defendant.

BYRD vs. *BOWIE.*

If the contract be usurious, the creditor can only receive the principal, without interest.

APPEAL from the court of the seventh district.

PORTER, J. delivered the opinion of the court. The defendant, sued on his promissory note, pleads payment—that his co-obligor, many years since, delivered to the plaintiff a negro man worth $1200, whose value ought to be imputed to the payment of the note—and that he further delivered

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two negro men to labour for the petitioner, whose services were worth more than the amount of the obligation.

There are interrogatories annexed to the answer, but it is unnecessary to set them forth, or the replies which were made to them.

The delivery of the negro man, in payment, is proved, and a receipt of the plaintiff's shews that his value was fixed at $550.

The only difficulty in the case relates to the other negro, who, the defendant affirms in his answer, was delivered on hire. If this were true the court would be inclined to think that the services of such a slave were not worth more than the use of $1200; but the evidence offered, and received in the cause without opposition, shews that the negro was sold and delivered to the plaintiff, in absolute property, and that the consideration for the sale was the loan of the sum already mentioned, for the space of four months. This is one of the strongest examples of usury and extortion, which has yet come before this court. The defendant is clearly entitled to a credit for the value of the slave, which is proved to have been

$350, and the plaintiff can only recover the balance of the principal without interest. *Herman* vs. *Sprigg, vol.* 3, 190.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant the sum of three hundred dollars, with costs in the court of the first instance, those of appeal to be borne by the appellee.

Scott for the plaintiff, *Oakley* for the defendant.

STERLING & WIFE vs. DREW & AL.

The possession acquired by actual occupation, tho' not maintained during the whole period required for prescription, cannot be interrupted by a possession merely civil. Where both claimants have obtained a relinquishment from the U. S, he who had the best title from the Spanish government, will prevail.

APPEAL from the court of the seventh district.

MATTHEWS, J. delivered the opinion of the court. The plaintiffs in this case claim title to a certain tract of land described in their petition. The defendant, Drew, disclaimed any right to the property, and the inhabitants of the parish of Ouachita were permitted to interfere in the suit, and become de-

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fendants. Judgment was rendered in their favor in the court below, from which the plaintiffs appealed.

The title set up by the latter is founded on an incomplete grant from the Spanish government to one Epinette, who conveyed his right to the Baron de Bastrop, from whom the title has been transmitted to the appellants, through several mesne conveyances, and has been recognised and confirmed by the United States.

The defendants claim title to the premises in dispute as having been set apart for the use of the parish, to be employed in public purposes, such as a burying ground and site for a church. This claim has been also confirmed by the government of the United States.

In support of the plaintiffs' title, prescription is relied on as based on possession of ten years, and in their claim this must also be taken into view.

In the act of sale from Epinette to Bastrop, the land sold is limited by that now claimed by the defendants. All the subsequent deeds embrace it within these limits. Possession since the year 1810 is proven

to have been held under Bastrop's sale, which included the disputed property — Those who claim in conformity with this deed, have had only a constructive possession of the land now sued for, unsupported by any title emanating from the former sovereignty of the country, for the act of sale from the grantee, under which their title is deduced, does not convey it to Bastrop. It is, however, a possession, by which they have obtained a relinquishment of the title of the United States, and is, perhaps, such as would have been sufficient to create title by prescription, were it exclusive and uninterrupted *ab initio*. Opposed to this possession is one set up by the defendants, which is supported by evidence, shewing that the inhabitants of the parish did use the land in the manner and for the purposes for which it was separated and set apart from the public domain. They enclosed part of it with fences, and buried their dead in it. These uses afforded the only means of taking possession, which united the will to possess with actual occupation, so far as the nature of the thing and its destination would permit. A possession thus commen-

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ced is well retained by the *animus retenendi*, which is presumed by law, and cannot be interrupted by an adverse possession merely civil or constructive. The plaintiffs therefore cannot succeed on the ground of their prescriptive title.

It then only remains to examine their pretentions, as supported by other evidences of title. These are the deeds of sale above stated, and they do not ascend so as to shew any concession, even of the most imperfect and inchoate kind, from the Spanish government, which includes the land in dispute.—It is true that this property has been relinquished and confirmed to them by the succeeding government, but it has also been relinquished and confirmed to the defendants. The respective claims and rights of both parties to the suit, rest on the titles which were obtained from the Spanish government, and if they be not equally weak and without foundation, we are of opinion that the preponderance is in favor of that relied on by the defendants, as it is shewn that the disputed ground was laid off and set apart for the use of the inhabitants of the parish.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court be affirmed with costs.

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Oakley for the defendants, *Thomas* for the plaintiffs.

OVERTON vs. *ARCHINARD.*

APPEAL from the court of the sixth district.

Property subject to mortgage for principal and interest of the price of a tract of land, is not subject to a demand for interest on interest growing out of a subsequent agreement of the parties.

MARTIN, J. delivered the opinion of the court. The plaintiff charges that in November 1819, he sold to Pannel a plantation and negroes, for $44,000, with interest at ten per cent. a year, from the first of February 1820. A sum of $4000 being payable on the 31st of March 1820, and $40,000 on the 6th of November 1829; the interest, however, being payable yearly on the first of March, and Pannel mortgaged, among other property, a negro slave named Delphia, now possessed and claimed by the defendant—that a sum of $1,600, part of the principal and interest, is still due him—that Pannel has failed, and is since dead, and the plaintiff has a judgment against his syndics. The petition concludes with a prayer that the defendant may be decreed to pay, or that the slave be seized and

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sold, for the payment of the sum due, and costs.

The defendant pleaded the general issue, and called Le Gras, his vendor in warranty, who brought in Scott.

Scott pleaded the general issue and payment by Pannel in his life time.

There was judgment for the defendant, and the plaintiff appealed.

The question turns entirely on the plea of payment. That the principal is paid appears by the receipts of Overton, duly recorded or authenticated, by which he acknowledges the receipt of the sums of $4000 and 1000, on the fifth of January 1820, and $19,200 on the 10th of March, 1820, expressly as part of the principal; and $19,800 on the sixth of April, 1823, being part of the sum of 44,000 dollars, agreed to be paid by Pannel for the plantation and negroes, for the payment of which the slave was mortgaged.

As to the payment of the interest, the plaintiff's receipts are produced for four thousand five hundred dollars, and it is further shewn that the plaintiff received Pannel's obligations for 120,000 weight of cotton in 1822, payable by instalments, and the delivery of the cotton

was secured by a mortgage. The cotton is shewn to have been worth upwards of 12,000 dollars.

On these facts, it is contended, on the part of the appellee, that the appllant is without right, and that the principal is expressly acknowledged to have been paid, and the interest was paid in part, and novated for the remainder.

It appears that the first instalment was paid on the 5th of January, and the interest was not to run until the first of February; and that on the former day the second instalment was reduced to 39,000 dollars.

That the interest on that sum, to the day of the payment of 19,000 dollars, is 2025; and the interest on the balance, 19,800 dollars, from the latter day to the last payments, April 6, 1823, two years and sixteen days, is 4043 dollars, making the aggregate of interest 6068 dollars. Of this sum, 4500 dollars appears to have been received by the plaintiff's express receipt, and the balance of 1568 dollars, is more than covered by the value of the cotton.

The appellant urges that what is done in a contract, rather than what is said, ought to

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give the character to every one of its parts—that, although the parties have said the price was 44,000 dollars, payable, 4000 dollars on the 31st of March 1820, and 40000 on the 6th of November 1829, with interest at ten per cent. payable yearly on the 1st of March, the vendor stipulated for, and the vendee agreed to, a price of about $80,000, payable 4000 in March 1820; 4000 on the 1st of March, in every year, until 1829; and 40,000 dollars on the 6th of November 1829.

It is urged that this was the intention of the parties, because it appears their calculation was made accordingly—and the interest has been calculated on the 4000 dollars called yearly interest, because the parties, by the agreement that the 4000 dollars should be demandable independantly from the principal, have made this interest principal, as it became due.

This mode of reasoning is certainly morally correct, and perhaps legally so, between the parties to the contract, who ought to comply with its stipulations in the manner in which they were conscious they were understood. But when the contract is to be enforced against a third party, he may refuse to be

bound by the acts of his vendor, beyond the terms consigned in the deed—and insist that they should receive a construction according to their legal import, unaffected by any arrangement of his vendor after the sale.

The mortgagor sold the slave to the person through whom the defendant mediately claims, on the 6th of December 1819, one month after she was mortgaged to the plaintiff. At that time no part of the capital or interest was payable. If three years afterwards, the mortgagor, on settling with the mortgagee, acted in such a manner as to furnish evidence that he considered himself bound to pay interest on interest, or on what he had called interest, and what we are bound to consider as such, this circumstance cannot prevent the liberation of the defendant, as soon as the mortgagee appears to have received what was legally his claim under the mortgage.

The vendee of land and negroes, neglecting to pay the price on the day stipulated, is liable to pay interest, although the contract be silent on this head; but no interest is due for a delay in paying that interest. His specific agreement may bind him to more than legal interest, as to a payment of interest indepen-

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dant of the principal; but it never can render that interest, an independant part of the price demandable as such, even if the vendor, not choosing to avail himself of the delay, effects the payment before.

In the present case, there cannot be any doubt that the plaintiff's receipt for $44,000 would have prevented the demand of any part of the yearly payment of $4000, for interest accruing after the payment.

We think the defendant has clearly shewn that the whole price and interest, according to the legal construction of the deed of sale, has been paid or novated, and that therefore the mortgaged slave is liberated from any claim of the plaintiff.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Oakley and *Rost* for the plaintiff, *Scott* for the defendant.

COHEN vs. *HAVARD.*

APPEAL from the court of the sixth district.

Notice to take depositions need not be personal, it may be left at the domicil.

MARTIN, J. delivered the opinion of the court. This appeal is from the refusal of the district court of a continuance.

The defendant swore that Mrs. Havard was a material witness—that the plaintiff resides in another state and his attorney has been absent from this, and consequently the defendant could not give him notice—that the defendant hopes to prove by her the precise time of the death of her husband, as whose bail he is sued.

The plaintiff's attorney offered to admit the facts, as the defendant swore his witness could prove them.

It appears to us the affidavit was insufficient. Notice to a party, or to his attorney, of the taking of a deposition, need not be personal; it may, like any other, be left at his domicil. It is not shewn how long the attorney was absent; no diligence is said to have been exercised.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiff, *Oakley* for the defendant.

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BAILLIO & AL. vs. *WILSON & AL.*

The court of probates may decide on the validity of a sale of land, when the question arises collaterally in the examination of other matters of which it has jurisdiction.

When the appeal does not stay execution, the reversal of a judgment in the appellate court, does not avoid the sale made under an execution issuing from the inferior court in virtue of the judgment.

But if the judgment of the inferior court was for the delivery of a specific thing, & this object was delivered in consequence of the party not being able to give security on the appeal, the reversal of the judgment would enable the appellant to get back the property detained in satisfaction of it.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court: This action commenced in the court of probates, and on judgment being rendered there against the defendants, they appealed to the district court, where that of the probate court was reversed. From this judgment the plaintiffs have appealed.

The petitioners state, that in the year 1818 they sold and conveyed to one James H. Gordon, two tracts of land for the sum of $16000, with interest on the different instalments at the rate of ten per cent. per annum, that after executing the said act of sale, the said Gordon departed this life, leaving the said sum unpaid; that his widow, Maria C. Gordon, natural tutrix of the minor children and heirs of her husband, has taken possession of the estate, and is liable for the payment of the debt due the petitioners. That since the death of James H. Gordon, the petitioners have proceeded against the said Maria, and her husband, Wm. Wilson, with whom, since the death

of James H. Gordon, she has intermarried, have obtained judgments and issued executions against them, and under the sales made in pursuance thereof have purchased the lands and hold them. That since the lands were sold, the defendants took an appeal and had these judgments reversed: that the lands still belong to the petitioners, but that there is a large balance yet due to them, and that the succession is solvent and able to pay them. That the funds are in the hands of the defendants, who are liable for the payment, and that tho' a long period has elapsed since the death of James H. Gordon, the said Maria, as tutrix to her minor children, who accepted the succession with the benefit of an inventory, has failed to render an account of her administration. The petition concludes by a prayer that the defendants may be cited and compelled to render a full and complete account of the administration of the said estate, and that they may be condemned to pay the amount due the petitioners, with interest and costs; and further, that the validity of the sales made to them may be enquired into.

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The defendants severed in their answers. Wm. Wilson pleaded the general issue, and denied the jurisdiction of the court.

His co-defendant also pleaded the general issue. She averred that she had renounced the community with her late husband; that, as tutrix to her children, she had administered on the estate; that she had caused a large part of the property to be sold at probate sale; that the lands which had been mortgaged to the present plaintiffs were offered for sale without success; that she was proceeding to cause other and further appraisements to enable her to pay the plaintiffs, but that they, not satisfied with these proceedings, instituted suit in the district court against the defendant and obtained judgments, which have been since reversed and annulled. That under these judgments the lands have been taken out of the possession of the defendant, as she was unable to give bond to stay the execution. That she has taken all legal means to procure restitution to the mass of the estate of the lands sold as aforesaid, so that she may proceed to a final administration. That she does not believe there will be property

sufficient to pay the debt due by the estate, but that she cannot ascertain how much the deficit will be until the lands purchased by the plaintiffs shall be sold. That she has made many payments to creditors. That she has been always willing to render an account, and still is so. That she hath done no act to render her liable in her private capacity, and that if she has, the court of probates has no jurisdiction of the demand, nor has it any to examine the validity of the sale of the lands; and finally, that no judgment can be given against her for a specific sum until the whole of the estate shall be sold.

The first questions to be examined arise out of the pleas presented to the jurisdiction of the court, and we think the defence well offered to that part of the petition which alleges the personal responsibility of the defendant, by reason of her mal-administration. Such action should be commenced in the district court.

But we do not think the court of probates is without jurisdiction to examine into the validity of the sales made under the judgment of another tribunal. It is true it wants

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the power to decide directly on titles to land; but where the question arises collaterally, and an examination of it becomes necessary in order to enable the court to arrive at a correct conclusion, on matters of which it has jurisdiction, as in the case before us, where the object is to ascertain how much is due by the estate, then the court, of necessity, must examine whether the sales made entitle the defendants to a credit.

The defendant is equally ill founded in her objection, that no judgment can be rendered against her for a specific sum, until the whole of the estate shall have been sold. A creditor, whose debt is disputed by an administrator of an estate, either in whole or in part, has a right to demand that it shall be liquidated and ascertained by a judgment, altho' after that judgment be rendered he may not be authorised to issue execution on it. A contrary rule would delay the creditor, unnecessarily, by compelling him to liquidate his claim after funds had come into the hands of his administrator to pay him. He may do it before, and have his debt established, so that when

money is received by the representatives of his debtor, they must pay him without further delay.

The district court gave judgment against the defendant, as tutrix of the minor children of James H. Gordon, for $8666 66 2-3, and directed the mortgaged premises to be sold by the probate court, for cash, that the proceeds should be first applied to the payment of the plaintiffs' demand, and that if any balance should remain due, that they be paid in common with the other chirographary creditors.

Tho' this judgment does not expressly pass on the validity of the sales made under the judgments obtained in the district court, it impliedly considers them void and of no effect, and the correctness of this opinion is the principal question which the cause presents, and that which has been most discussed at the bar.

It is one of considerable importance, but not of much difficulty. The acts of the legislature provide that on all judgments rendered by the courts of justice of this state, executions may issue after a certain number of days, unless these judgments shall be stay-

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ed in their execution by an appeal. And they further provide, that no appeal shall stay execution unless the party cast shall give bond, with good and sufficient security, in a sum not exceeding double the value in dispute. 1 *Mart. Dig*, 438.

These acts also provide for the manner in which executions shall issue—their form and effects: and one of these effects is expressly stated to be "that a sale under them *shall vest in the purchaser all the right, title and interest which the defendant had in the thing sold.*" They make no distinction between executions, on judgments final, in a court of the last resort, and those emanating from a tribunal whose decrees are subject to revision and reversal; all are declared to *vest* the title of the defendant, *absolutely*, without *condition* of any kind. It is clear then that we have not the authority to say, that on any subsequent event that title shall be *divested*. 2 *Mart. dig*. 172.

The letter of the law being therefore directly opposed to the construction contended for by the appellees, it might be sufficient to leave the question on that ground alone, but as the contrary doctrine has been strenuously

contended for, it may not be amiss to consider the subject in other points of view.

The legislature, in acting on this matter, had, as they have in most others, but a choice of inconveniences. On the one hand there was that of permitting debtors to waste their property, or put it out of the reach of their creditors, during the period that might elapse between giving judgment in the court of the first instance, and that of the appellate tribunal: on the other, that of exposing the defendant to the hardship of having his property sold at, perhaps, less than its real value, to satisfy a judgment which might be reversed. They chose the former as the least evil of the two, and we think wisely. The presumption is against the debtor and in favor of the judgment rendered against him, and he should not be permitted to delay its execution unless he can place the person, in whose favor it has been rendered, in as good a situation as he would have been, had the appeal not been taken.

If we suppose these to have been the motives why these laws were passed, and we can imagine no other, the principles contended for by the appellee would defeat the object

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contemplated by the law maker. No one would purchase at a sheriff's sale, on the risk of having the property taken out of his hands, with an uncertain recourse on the creditor for the purchase money, who might be a non resident, or have become an insolvent in the interval between judgment below and above; or if he did, he would do it at such a hazard as would make the contract in effect more resemble an aleatory one than any thing else, and consequently the goods of the debtor would be always sold at a sacrifice, for the purchaser would seek indemnification for the danger to which he was exposed, in the profit which he might hope to make. Execution is quaintly, but truly, called the life of the law. The doctrine on which these sales are sought to be avoided, would make it any thing else, or if, in some cases, it would have that effect, it would be with great injury and loss to the defendant.

It was urged from the bar, that as the only authority for the execution was the judgment of the court, the reversal of that judgment necessarily rendered every thing which had been done under it, void. But the position we consider to be quite untenable. The des-

truction of a power does not carry with it the destruction of the effects which that power, when in force, may have produced. This might be illustrated in a variety of ways, and by examples drawn from every science. But we will take one from that which we are most in the habit of studying and best acquainted with. If an agent should sell a tract of land under a power of attorney, a subsequent revocation of that power would surely not annull the sale that was made under it.

Again, if the legislature had contemplated that any such consequence was to result from the reversal of the judgment, we must presume they would not have neglected to make particular provisions in relation to it, in order to meet the exigencies of different cases. For even on the principles contended for by the appellees, it is not every reversal which should produce a rescision of the sale. The judgment may be only avoided in part, and confirmed for an amount greater than that made on the execution—it may be remanded, for some mistake in conducting the proceedings below, and ultimately confirmed to the whole extent of the first judgment. Cases, then, so entirely dissimilar from those where

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the decree of the court of the first instance is reversed in *toto*, would, we believe, have received, as they certainly required, different regulations, if it had been intended that a reversal of the judgment of the inferior court should annul the sale by the sheriff made under it.

There is still another consideration. It is now upwards of twenty years since these statutes have been passed. So far as our experience has extended, this is the first time that an attempt has been made to set aside sales made under judgments which were afterwards reversed; and yet the cases must have been numerous, where there were strong motives to do so. This long acquiescence under the construction which we now adopt, is a powerful argument to shew its correctness. It proves how these laws have been understood by the profession.

Leaving the question for a moment on that ground, let us now see what is done in other countries. The form of our writ of execution, as it is well known, comes from the common law. It is a well settled principle in that system, that on the reversal of the judgment of the inferior court, the plaintiff in error is

only restored to the money made under the *fieri facias*, not to the thing sold. 2 *Tidd. Prac.* 1129, 2 *Bac. ab.* 506 (Am. ed.) 8 *Co.* 19 *Cro. jac.* 246.

If indeed the property is only extended on an *elegit*, the defendant in execution gets it back, because there has been no alienation under the writ. And so it would be here if the judgment of the court below was for the delivery of a specific object, and that judgment should on appeal be annulled 2 *Bac. ab*, 507.

The Spanish law can afford us no guide for settling this question. In that country the adjudication of property under execution, was a *judicial act*, to which act purchaser, plaintiff and defendant were parties—from the judgment rendered thereon, the defendant might appeal, and the reversal of the sentence of adjudication left the buyer, of course, without title. The creditor was obliged in all cases, by virtue of the law *Toledana*, to give security for the return of the property, in case the sentence of *remate* should be reversed. *Cur. Phillip, p.* 2, *juicio executivo verbo citacion, ibid sentencia*, §20, *no.* 1 & 2, *ibid remate no.* 1. *Febrero, p.* 2, *lib.* 3, *cap.* 2, §*fin. no.* 386, 387.

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We are, therefore, of opinion that the amount received on these executions, must be credited to the defendants, and the debt due to the plaintiffs being fully established, that they must have judgment for the balance due.

The district court, in giving judgment, left out of view the sum of 4333 dollars and 33 cents, on which the plaintiffs had obtained judgment in the district court, on the ground that as the amount was settled by a decree of that tribunal, it formed a distinct and separate claim, which ought to be presented to the court of probates as such.

But in this it erred. The object of this suit is to ascertain what sum is due to the plaintiffs on the whole transaction, so that the tutrix may pay them their proportion with the other creditors. All the claims then should be embraced.

The plaintiffs shew that at the death of James H Gordon, there was due to them $13,000, with ten per cent. interest. On that sum there has been made by execution, issuing on the judgments obtained on the last instalments, $7160; the plaintiffs then are entitled to judgment for five thousand eight hundred and forty dollars, with interest, to be

calculated by ascertaining the interest from the time the obligations became due until the day of partial payment, adding the interest to the principal, and deducting the payment. 1 *N. S.* 572. 3 *ibid* 487.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. And it is further ordered, adjudged and decreed, that the plaintiffs do recover of the defendant, Maria C. Wilson, tutrix, the sum of five thousand eight hundred and forty dollars, with interest as aforesaid, to be paid by the said Maria C. Wilson out of the estate of James H. Gordon, in her hands to be administered as tutrix to his minor heirs. And it is further ordered, adjudged and decreed that no execution shall issue on the judgment, until the said Maria C. Wilson shall have filed to render her account, according to law, in the court of probates; and to pay over to the plaintiffs such portion as may be due to them as chirographary creditors.

Thomas & Baldwin for the plaintiffs, *Rost & Wilson* for the defendants.

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When the will does not give seizin to the executors, they are all entitled to commission only on the sum which came into their hands to pay debts and legacies.

A donation of community property, by the husband to one of the children, must be collated one half to the father's estate & one half to the mother's.

BAILLIO vs. *BAILLIO.*

APPEAL from the court of probates of the parish of Rapides.

MATTHEWS, J. delivered the opinion of the court. This is an appeal from a judgment of the court below, by which the property of the community of the widow and her late husband, is divided, and a partition ordered, of the succession of the latter, among his heirs. The appeal is taken and prosecuted by one of the heirs only, whose husband acted as testamentary executor of the deceased.

The case offers two questions for solution. The first relates to the commission or per centage allowed by law to executors. The second arises out of the manner in which the judge *a quo* directed the collection of certain advances which had been made to some of the heirs and descendants, by their father, before his death.

As to the first of these questions, we are clearly of opinion that the decision of the court below was correct. The will did not give

seizin of the succession to the executors of the deceased, and consequently they are entitled to a commission on that part of the estate alone which fell into their hands for the purpose of paying debts and legacies, which has been allowed to them. *See O. C. Code, p.* 248 & 179.

The circumstance of the community of property which existed between the widow and heirs of the deceased at the time of his death, renders the second question somewhat difficult to solve.

In the present case, advances were made by donations from the father to some of his children, out of the property of the community, or common stock of acquests and gains belonging to him and their mother, who is still living. In bringing back these donations, a question arises, as to the manner in which they ought to be collated.

The law requires property given in advances to heirs, to be collated to the succession of the donor; and as the husband is master of the community of acquests subsisting between him and his wife during his life time, and may sell, or in any other manner dispose of the effects belonging to such community, it

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would seem that a gift made by him to one of his children, which should, after his death, be subject to collation, ought to be returned *in toto* to his succession. But, according to the most celebrated commentator on the French code, which is very similar in its provisions to our own, on the subjects of community of goods between husband and wife, succession, and collation, a contrary doctrine is maintained; which requires that, when the donation is of common property, collation takes place by moiety, although the husband should have been sole agent in the gift or advance to the children; and this appears to us to be equitable. *See* 4 *Toillier, p.* 460, *no.* 464. Collation, however, cannot be required, until the opening of the succession to which it belongs. Admitting that the advances made by P. Baillio to his heirs, must be collated by halves, one moiety to be returned to his succession, and the other to that of his wife, the latter return cannot take place until her succession be opened; this part of the donation must remain undisturbed in the possession of the donees until that event happens. The judge of probates erred in collating the advances made to P. Baillio, as to the

whole mass of the community, and giving to the widow one half of the aggregate thus formed. The common property, as it was at the time of the death of one of the partners, should have been divided between the survivor and the heirs of the former; and to the half thus allotted to said heirs, should be added one half of the advances made to them, as subject to collation in the succession of their father; as the other half cannot legal y be disturbed until the opening of the succession of the mother, it shonld not have been acted ou.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be avoided, reversed, and annulled: And it is further ordered and decreed that the cause be remanded to the court of probates, with directions to the judge of said court to proceed to a partition of the estate belonging to the widow and heirs of the deceased, agreeably to the principles laid down in the above opinion. And it is further ordered, adjudged and decreed, that the appellees pay the costs of this appeal.

Johnson & Baldwin for the plaintiff—*Thomas* for the defendants.

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BAYOUJON'S HEIRS vs. *CRISWELL.*

Should the lessor not appear when cited by the lessee, the right of possession alone can be tried.

The absence of an attorney without good cause shewn for it, is not a ground of continuance.

There must be 30 names in the box before the clerk can proceed to draw a jury.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This is a petitiory action. The defendant answered the original petition, by denying the facts alleged in it, and averring that he, and those under whom he held, had enjoyed peaceable and uninterrupted possession of the premises for five years. He further pleaded that he was in possession as tenant of John J. Bowie, who held under Daniel W. Cox, who was the legal owner of the same, and he prayed that the latter might be cited to defend his title.

Cox appeared and pleaded that he had a better title for the land in dispute than the plaintiffs, and that he would produce it when required.

The plaintiffs afterwards filed an amended petition, to which the defendant answered by averring that he held under Bowie, and prayed that he might be cited.

At a subsequent term the defendant put in exceptions to the amended petition, which the court disregarded, and in our opinion cor-

rectly, as the defendant was too late in offering them after he had disclaimed title and called in his lessor in warranty.

Neither the party cited in warranty by the defendant in his answer to the original or amended petition having pleaded to that amendment, the cause must of course be considered as tried between the lessee and the plaintiffs. See the case of *Kling* vs. *Fish*, *vol* 4, *n. s.* 391.

By our law, after the lessee has disclaimed title, and called in his lessors, nothing can be tried between him and the plaintiff but the possessory right. *Par.* 3, *tit.* 2, *law* 29. *Civil code* 375, *art.* 25. *Vol.* 4, 395, *Kling* vs. *Fish*.

When the cause was called up for trial, the defendant moved for a continuance for want of material testimony, which, he stated, was in the hands of one of his counsel, who had failed to attend from some cause unknown to the defendant. The judge refused to grant it, and the propriety of this refusal is brought before us by a bill of exceptions.

We think the judge did not err. Parties are bound by the act of their attorneys, and unless it appears they were prevented from

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attending court by some event beyond their control, their absence cannot be considered as a good ground for a continuance. In this case the defendant had disclaimed title, and the only matter at issue was the right of possession.

When the jury were about to be empannelled, the defendant objected to the tickets, containing the names of the jury, being drawn out of the box before it was ascertained that there were twenty in attendance. We think this objection well taken, and that the judge erred in overruling it. The code of practice requires that before a cause is tried by a jury the original venire should be called over, and if twenty of them be present, that then the clerk shall proceed to draw twelve out of the box to decide the case. According to a statement in the bill of exceptions, there were only five in attendance. This was not enough, that fact should have been ascertained before the drawing commenced, and the number of twenty should then have been made up by talesmen, and the whole of their names be put in the box before the drawing commenced. The provisions in the code of practice are not clear, but this is the way we under-

stand them. *Code Prac.* 496, 497, 513.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that the cause be remanded for a new trial, and that the appellee pay the costs of this appeal.

Scott & Boyce for the plaintiffs, *Thomas* for the defendant.

WRIGHT vs. *HARMAN & AL.*

APPEAL from the court of the sixth district.

Sheriffs cannot demand the fees given by law for keeping slaves, unless they are detained in actual custody. But they may recover on a *quantum meruit* for the monies actually expended by them.

MATTHEWS, J. delivered the opinion of the court. In this case the plaintiff claims remuneration from the defendants, as owners of certain slaves, for expenses incurred by him in feeding and clothing said slaves, whilst under his care and keeping, by virtue of an order of the parish judge. He obtained judgment in the court below for the full amount of his demand, from which the defendants appealed.

Payment is resisted by the appellants on two grounds: 1st. That the expenses thus incurred arose out of a criminal prosecution,

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which they are not legally bound to pay: 2d. If they are liable, in any manner, to pay the sums claimed by the appellee, this liability extends only to money by him actually laid out and expended for their use and benefit.

The facts of the case shew that these slaves were placed in the possession of the plaintiff, as sheriff of the parish of Rapides, by an order of the judge, made in relation to a criminal prosecution, about to be carried on against one of the defendants; that they were never committed to jail, but submitted to the keeping of a citizen of the parish, who made no charge for the food with which he supplied them; and that the appellee did pay for clothing said slaves $59, which was absolutely necessary.

This sum is not objected to by the appellants, and as we are of opinion that the appellee cannot recover more from them on a *quantum muruit;* it is thought to be unnecessary to decide on the first ground of opposition assumed in the defence. It has been already settled, by two decisions of this court, that sheriffs or jailors are not entitled to recover fees from the owners of run-

away slaves for keeping them, unless they have been confined in jail, or their keepers have actually incurred expenses in their detention. The same principles which governed in the decision of those cases are applicable to the present. In the case of *Morgan* vs. *Mitchell*, 3 *vol.* 577, *and Montegut* vs. *Dauphin*, 1 *vol.* 258.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled: and it is further ordered and adjudged, that the plaintiff and appellee do recover from the defendants and appellees the sum of $59, with costs in the court below, and that he pay the costs of this appeal,

Baldwin & Wilson for the plaintiff, *Thomas* for the defendants.

GLAZE vs. *RUSSELL.*

APPEAL from the court of the sixth district.

If the appeal bond be given for a less sum than that directed by the judge *a quo*, het appeal will be dismissed.

MARTIN, J. delivered the opinion of the court. The appellee prays that the appeal be dismissed, the appellant having given bond

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for $100 only, when the judge had directed a bond for $650.

The appellant resists the application on the ground that he claims a devolutive appeal only, and one hundred dollars are sufficient to cover the costs.

The law has not left the party a judge of the amount of the bond, even on a devolutive appeal, but it requires him to give bond and surety "to such an amount *as the court may determine*, as sufficient to *secure the payment of the costs.*" *Code of practice*, 578.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed.

Bullard & *Rost* for the plaintiff, *Oakley* & *Wilson* for the defendant.

CUNY vs. *ARCHINARD.*

When in the sale of a tract of land there is error as to the quantity contained within certain limits, but none as to the limits, the vendor cannot claim any land lying within these limits.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The ancestors of the present plaintiff and defendants were heirs of Cesar Archinard. Among other property owned by him, was a tract of land lying in the parish of Rapides, on which he had opened a plantation and re-

sided. This plantation, after various sales made in order to effectuate a partition, for the succession appears to have been a subject of great litigation among the heirs, was jointly purchased by the immediate ancestor of the defendant, under a description which stated it to consist of 950 arpents. A survey having been lately made of the land included within the patent, it was found to embrace the quantity of 1854 arpents; and the plaintiffs have brought this action, alleging that the surplus quantity above 950. has never been sold, and that they are entitled to the one half of it.

The inventory and different sales have been introduced, for the purpose of shewing what was the understanding of the parties in relation to the true extent of the land in question.

The inventory made in the year 1809, states it to be a tract of land, of 950 arpents, lying on the bayou Rapides, being the residence of the deceased, consisting of a plantation under fence, a dwelling-house and out-houses, a cotton gin, press, and grist mill, inclusive, and various improvements.

At the sale made by the parish judge, the ancestor of the plaintiffs became the purchaser, under a description as follows—"A tract

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of land, of nine hundred and fifty arpents, on the bayou Rapides, being the residence or home plantation of the deceased Cesar Archinard and Eliza P. Archinard."

For some reasons, which do not appear in evidence, and which could not be of any importance in deciding on the rights of the parties now before us, the property belonging to the succession was again put up at auction, and at this sale the ancestor of the defendants became the purchasers, the land being described as follows—"950 arpents of land on the bayou Rapides, the tract whereon R. E. Cuney now lives, *agreeably to the title papers.*"

This sale was made by the sheriff, and in the deed of conveyance given by him to the purchaser, the same description is given as that just mentioned.

The title of the land consists in a complete grant from the Spanish government, and it gives the following limits to the land conceded to the ancestor of the parties:

"*Lindando de un lado con tierras pertenecientes a Mr. Duparc, y del otro a las de Don Ricardo Edmond Cuney, como lo demu-*

estro prolixamente el plano figurativo que antecede."

"Bounded on one side by lands belonging to Mr. Duparc, and on the other by those of Mr. Richard Edmund Cuney, as is more fully shewn by the antecedent plan of survey."

This plat represents the land with the limits there given, and is stated to contain 950 arpents.

The real question in this cause, lies within a very narrow compass. It is, whether the sale was what is called in our law *per aversionem*. It is certainly a correct principle, as contended for by the counsel for the appellants, that where a tract of land is sold as containing a certain quantity, without boundaries being given, that if there be error in both parties, in regard to the quantity, the vendee has no right to demand the surplus. It would be inequitable that he should, for it did not enter into the contemplation of either to make it the subject of the agreement. The doctrine in our law, in relation to sales *per aversionem*, is not understood to affect this principle; but on the contrary, to sustain it. It proceeds on the idea that where the object is sold in bulk, and by certain limits, that it must be under-

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stood their attention was more fixed on the size or limits, than on the quantity which it was stated these limits contained. Where the object sold is an island, or a field inclosed, the application of these principles is easy; but where it is of great extent, and the boundaries not perfectly known, as was frequently the case in the early settlement of this state, the reason on which the rule was established certainly does not apply with the same force.

But the case before us is not one which would justify us in taking it out of the rule, even on the ground just stated. The land is not of great extent. The parties who were of full age, knew well its limits, and as the purchase was made in reference to these limits, the boundaries must control the quantity.

In the case of *Fouche* vs. *Macarty*, reference was not made to title papers in possession of the heirs, but to those which ought to exist in the office of the notary public; and the opinion of the court went expressly on the ground, that neither seller or buyer knew the fact, that the plantation had received an accession of twenty-six arpents in depth, by a second grant from the Spanish government. A conclusion which was rendered very strong

in that case, by the circumstance of the heirs being minors, and the sale being conducted by their tutor. In the cause now before us, the heirs were of the age of majority, and they had been for some time in litigation respecting this property. The ancestor of the plaintiff had once purchased it, and had been in possession of it. We have no doubt, therefore, that both knew the limits; and if both knew them, and the one bought, and the other sold, in reference to them, they must control the enumeration of quantity; or in other words, although there might have been *error as to quantity*, there was *none as to boundaries* and the error of the former kind, in a sale *per aversionem*, will not enable the vendor to claim any part of the property contained within these boundaries.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiffs, *Baldwin* for the defendants.

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GARDERE & AL. vs. MURRAY.

If a judge signs a judgment before the proper time, the party may still move for a new trial, in the same manner as if the judgment was unsigned.

If the party instead of doing this, appeals, he is precluded from urging that the judgment was not final.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs charge, that the defendant being their attorney to prosecute a debtor of theirs, received from the latter notes, which he applied to his own use and surrendered the documents of their claims and has never accounted to them.

He pleaded commorancy, the general issue, and other pleas. There was judgment against him and he appealed.

His counsel here urges that the judge signed prematurely the judgment, and adjourned the court on the same day, whereby he was prevented from applying for and obtaining a new trial.

The record shews judgment was given on the 3d and signed on the 4th of January.

The adjournment of the court does not appear as it should, by the transcripts of the entry on the minutes, but the clerk has certified the fact in a memorandum which appears as a postcript.

If a judge signs a judgment before the proper time, his signature does not prevent

the party cast from applying for a new trial, in the same manner as if the judgment remained unsigned.

When a court is about to adjourn, a party who has an interest to procure a new trial, ought to make his motion before the adjournment. 2 *Martin's digest.*

The defendant applied on the eighth of January and obtained an appeal; this certainly precludes him from urging that the judgment did not become final three days after it was rendered, because prematurely signed.

The defendant does not produce any evidence to support the plea of commorancy.

On the merits, the case turned on the mere question of fact, and we think it was correctly solved.

It is therefore ordered, adjudged and decreed, that the judgment be affirmed with costs.

Oakley & Wilson for the plaintiffs, *Scott & Boyc* for the defendant.

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WOODS vs. *KIMBAL.*

If the owner of land entitled to a pre-emption for lands adjoining it, sell this right to another, and afterwards enter the land subject to the pre-emption in his own name, the title acquired by him will enure to the benefit of the vendee.

APPEAL from the court of the sixth district.

MATTHEWS, J. delivered the opinion of the court. This is a petitory action, brought to recover a tract of land alleged to be in the possession of the defendant. Judgment was rendered in the court below against the plaintiff, from which she appealed.

The written evidences of title in the appellant, are, a plat of survey for Peret Godoi and a certificate in his favor from the land office; an act of sale from Godoi to Perrault, a sale from him to John Wood, and a sale from the latter to E. Wood.

The written evidence of title, offered and received on the part of the defendant, consists of a deed of sale from the hirs of Antoine Godo to Wade Kimbal, a sale from him to Marcote, articles of partnership entered into between the latter and A. Plauche, an act of dissolution of said partnership, a deed of exchange of part of said land to Moreau, a sheriff's sale of the whole tract, as the property of Plauche, to Joseph Kimbal, and sale from the latter to the defendants. There is also a plat of the whole tract belonging to Godo's

heirs, purporting to contain 2000 acres, of which the land in dispute made a part.

There is a bill of exceptions, taken to the introduction of the certificate of the register of the land office, on the part of the plaintiff, which need not be noticed, as we are clearly of opinion, that the whole evidence of the case clearly shews that PerretteGodo, under whom the plaintiff claims the disputed land, obtained his title or claim from the U. S. in virtue of a preemption right which was supposed to exist in him at the time of obtaining the certificate of the register. The evidence in support of the pretentions of the plaintiff would, perhaps, be sufficient to shew title in her, and consequently a right to recover in the present suit, if no other title were shewn on the part of the defendant.

In the first deed exhibited in his chain of titles, the right of preemption to the back lands was expressly conveyed to the vendee, and with this privilege, through several conveyances, it has come to the present proprietor and possessor. Godo, who obtained the title by preemption from the U. S. was a party to the original act of sale under which the defendant claims, and by that act divested himself of any

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preemption right which he might otherwise have had. After such divestment on his part and transfer to his first vender, any title he may have subsequently acquired, in virtue of the right thus transferred, must equitably enure to the benefit of the latter and those claiming under him. In addition to this strong ground of defence, it is shewn by the oral testimony in the cause, that the land now sued for is embraced by the notorious limits of the entire tract of the grantees, heirs of Godo.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Flint for the plaintiff, *Boyce* for the defendant.

ADAMS vs. *GAYNARD.*

APPEAL from the court of the sixth district.

When a jury is prayed for, and improper evidence admitted, or proper rejected the case is remanded.

MARTIN, J. delivered the opinion of the court. The plaintiff claims a slave in the defendant's possession; the latter pleaded the general issue, prescription and title.—He had a verdict and judgment, and the plaintiff appealed.

Our attention is drawn to five bills of exceptions. 1. The first is taken by the plaintiff to the opinion of the court in permitting a witness to be sworn to prove the amount of certain debts due on notes and receipts' on the ground that the notes and receipts were neither produced nor accounted for.

We think the court erred, the written being the best evidence.

2. The next was on the court permitting a bond of Richard Adams, to the sheriff of Avoyelles, for the production into court of a certain slave, supposed to be the one sued for, to be read in evidence.

We think the court erred. Richard Adams not being the plaintiff, nor a party to the suit, and it being not pretended that he acted by the authority of the plaintiff, the latter could not be bound by any act of the former.

3. The next was to the introduction, by the defendant, of the plaintiff's receipt to a person thro' whom the slave is claimed by the defendant. The plaintiff's counsel urged that this document was irrelevant and offered to establish a set off against the demand of a slave.

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We think the court did not err. The paper was proper testimony to establish the ratification of the sale by the plaintiff's receipt of the price.

4. The fourth was to the introduction of a transfer of the slave from Doughty, and a subrogation of the latter's claim on the plaintiff to the defendant.

We think the court erred, as the title to the slave, in Doughty, nor his power to sell him were shewn, and as the debts to which the defendant was subrogated are not the object of the present suit.

5. The fifth was to the defendant's being allowed to give in evidence a conversation between the plaintiff and Doughty, in which the former ratified and confirmed the sale made by the latter of the slave sued for.

We think the court erred. The ratification or confirmation of the sale of a slave, is a covenant tending to the disposal of him, and no parol evidence can be received of it. *Civ. code* 304, *art.* 241.

The last was to the introduction of evidence of a conversation between the plain, tiff and Doughty, at the time the former signed certain receipts to the latter.

We think the court erred. A receipt is an act, and no evidence can be received of what is said before, at the time of signing an act or since. *Id. art.* 242.

We are pressed by the plaintiff's counsel to act on the evidence on the record, after rejecting the part of it that was irregularly admitted.

The defendant having prayed for a jury, has a right to have the facts acted on by them. He, perhaps, had a right to think the evidence legal, when the court admitted it, and had it been rejected he might have supplied its defect by other evidence.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, the verdict set aside, and the case remanded, with directions to the judge not to permit parol evidence to go to the jury of the amount of debts, ascertained by notes and receipts, neither produced nor accounted for, nor of the conversations of the plaintiff tending to establish the sale of a slave, or of what he said at the time he signed a re-

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ceipt. And it is ordered that the defendant and appellee pay costs in this court.

Boyce for the plaintiff, *Bullard* for the defendant.

BRAY vs CUMMING & AL.

Where the title of slaves, alleged to be given by the father to the son in-law, in consideration of marriage, is at issue, declarations of the wife are not good evidence.

If the party claims under the laws of another state, and fails to prove them, the case will be decided by those of our own.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. This is an action of trespass for taking two of the plaintiff's slaves. The defendants severed in their answers. Cumming pleaded title in himself and prescription. Russel pleaded the general issue and justification, averring that, as a constable, he assisted Cumming in a search warrant issued for the slaves.

The plaintiff had judgment, and the defendant, Cumming, appealed.

The evidence shews, that on the marriage of Cumming with the plaintiff's daughter, in the state of Mississippi, two slaves, the issue of a negro woman possessed by the plaintiff, accompanied her to her husband's. Afterwards the plaintiff, and Cumming and his wife, came to Louisiana, bringing the

two slaves, who remained with him 'till her death, when they went to the plaintiff's. The plaintiff gave in these two slaves as his property and paid their taxes. Cumming was heard to say that he did not pay their taxes, because the plaintiff had never given him a title. He married the plaintiff's daughter in 1816: they came over the same year, and she died in April 1 25.

A witness deposed, he bought slaves in the state of Mississippi without bills of sale. The clerk of the court told him none was necessary. Another deposed, he sold about forty slaves in that state; written sales were necessary, but they needed not to be recorded; he had always understood that a gift of negroes, on marriage, was not required by law to be written. He had, himself, some property in Natchez in that situation, and enquired of a lawyer, who said the title was good, but the witness knows not the law of the state of Mississippi.

The plaintiff proved his daughter was heard to say the slaves were not given her.

To the admission of evidence of what the wife had been heard to say, the defendant excepted, and we think the court erred in

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overruling his objection, for hearsay is no evidence, except as to what is said by a party to the suit.

He offered a witness to prove that the plaintiff had said he had given the slaves to his daughter—the plaintiff's counsel objected to this, but the court sustained the objection on the ground that the defendant had failed in the proof that a gift of slaves may be made by parol, in the state of Mississippi, and we do not think the court erred.

Leaving what the wife said out of the testimony, the plaintiff has shewn the negroes were his, and the defendant has not proved that the title to them passed out of him: as he claims without a good title, the prescription of fifteen years can alone help him.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Bullard for the plaintiff, *Scott* for the defendant.

TANNER vs. ROBERT.

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If a widow renounces her rights under a will, the idea that she is entitled to one half of it in her own right, and it afterwards appears she was in error as to the extent of her claim, the renunciation will not bind her.

APPEAL from the court of probates of the parish of Rapides.

MATTHEWS, J. delivered the opinion of the court. In this case the plaintiff claims property as the heir of his deceased child, and prays that a partition may be made between him and the children of his late wife, by a former husband. The judge of probates made a decree, by which he considered all the estate left at the death of the former husband as belonging to the community which existed between them; and which ought to have been equally divided and partitioned between the widow and the heirs of her first husband. From this judgment the defendant appealed.

The evidence of the cause which comes up on the record, shews that the mother of the deceased child, under whom the appellee claims as heir, was married to Grimbal Robert, in the state of South Carolina, by whom she had issue two children; that after the death of Robert, she was lawfully married to the plaintiff, and had by him one child, and subsequenily died, leaving the child alive,

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which died previous to the commencement of the present action. It is also in proof that, at the time of the marriage in South Carolina, the widow of Robert, and late wife of Tanner, was owner of certain slaves, which, with their increase, were found among the property held by her former husband. Ten witnesses proved that, according to the laws of that state, slaves are viewed as personal property, and are acquired *ipso facto* on marriage by the husband. The only property acquired by Robert and his wife during their coverture, and whilst they lived together in this state to which they removed, was a tract of land paid for entirely out of the funds of the husband. Robert made an olographic will, by which he left to his wife a specific legacy, consisting of certain slaves therein named; some of which, if not the whole, were those which he had acquired by marriage with her in South Carolina. By this will he also bequeaths one to her half of his estate. Subsequent to his death, the widow caused an inventory to be made of all the property which he held during his life time, and claimed in that proceeding as her own, the slaves which she had brought in

marriage, and which had been bequeathed to her by the will of her husband, as above stated. It is proved that nothing was gained during the marriage whilst the husband and wife lived in this state. After all the proceedings, some heirs of Grimbal Robert, children of a former bed or marriage, appeared and claimed their portions of their father's estate, and to them the widow relinquished all the property which belonged to that estate, on condition that her two children by Robert, should share and partake one fourth part thereof. This is a summary of the important facts of the case, from which the legal rights of the parties litigant are to be deduced.

According to the laws of South Carolina proven, the slaves which the wife owned before marriage, and all personal property which she acquired, afterwards vested in full right in her husband, as a consequence of the matrimonial union. The land purchased by him in this state, and paid for out of his own funds, became exclusively his. In truth, the evidence shews that at his death, nothing existed which could form a community of acquests and gains; we are,

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therefore, of opinion that the judge *a quo* erred in considering all the property left by Robert at his decease, as belonging to a community existing between his heirs and his surviving wife. It is true, that agreeably to the provisions of our laws, marriage superinduces a community of acquests and gains between husband and wife; and that all the property left at the death of either party, is presumed to constitute such community. But this presumption, like all legal presumptions, falls before proof to the contrary; *stabit presumptio donec contrarium probetur.* And in the present case we have proof to the contrary, shewing that all the estate belonged to Robert the husband.

From this view of the case, we are necessarily led to the consideration of the will, inventory and agreement, by which the widow settled the affairs of her deceased husband's estate, with his heirs. The will, we think, is good and valid in point of form and probate; and transferred in fee simple all the disposable portion of the testator's succession: but, as he had forced heirs at the time his estate descended, he could only give by will, one-fifth part of his property to the

prejudice of such heirs. As to the agreement, by which it is contended the widow gave up all her right in the succession of her husband; we are of opinion that it was made in relation to the will and inventory, and that in endeavouring to find out the intention of the parties to that contract, these instruments must be taken into consideration. The will gives to the widow specific property by one clause, and by another one half of the estate of the testator; when the inventory was made by the legatee, she claimed as her own, all the property which constituted the specific legacy, causing all the rest to be inventoried as the estate of her late husband, one-half of which she might have thought herself entitled to under his will: and this alone, we believe, she intended to surrender by the agreement entered into between her and the heirs of her husband proceeding from a former marriage. But it may be said, that as she could not acquire under the will more than one-fifth of the testator's succession, it is that alone on which the agreement operated, and was thereby transferred; this cannot be supposed, unless it be admitted that the widow intended to strip herself of every atom of

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property, and that with a view of her children enjoying only one-fourth part of it—a supposition too abs rd to be tolerated. The agreement was made in error of the legal rights of the parties, and really transferred none from the legatee; but left the estate of the testator to be partaken according to law, except perhaps, a small advantage to her children.

It is therefore ordered, adjudicated and decreed, that the judgment of the court of probates be avoided, reversed and annulled. And it is further ordered, &c. that the cause be sent back to the court below, with instructions to the judge to cause a partition to be made in such a manner as to allow to the plaintiff, as heir of the deceased child, one-third of his late wife's estate, as derived from the former husband; that is to say, one-fifth part of his succession.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, NOVEMBER TERM, 1826.

THOMPSON vs. *LINTON & AL.*

APPEAL from the court of the first district.

When distinct claims against distinct defendants, are presented together to a jury, and they find generally, the verdict will be set aside.

MARTIN, J. delivered the opinion of the court. The plaintiff states that the defendants (Linton, Brower & Lewis,) and others, entered into an agreement with the plaintiff, whereby they were to furnish a boat or boats for the piloting business; and that the earnings of said boat should be divided as follows: two-fifths thereof by the owners of the boats, and three-fifths by the pilots; and that the plaintiff, who was to be the agent, should receive 5 per cent. on all monies collected—2 1-2 per cent. on all advances—and 1 1 2 on all purchases. The defendants, and the other parties to the

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agreement, (Lightburn, Prince & M'Donald,) promised to forward to him all the bills to be, and all the monies, collected.

That, in pursuance of said agreement, the plaintiff, the defendant Linton, and one Hollman, purchased a boat, for which they paid $1,700; and the defendant Linton, (a commissioned pilot) took possession of the said boat, and with the other two defendants, his under pilots, has ever since used and employed her in piloting vessels.

Yet they never transmitted to the plaintiff any bill to be, or any money, collected; and have employed other persons to make the necessary purchases.

The petition concludes with a prayer, that the defendants may account; and that they may be decreed to pay one-third of two-fifths of the earnings: five per cent. on all the monies collected; and one and a half per cent. on the purchases—or damages.

Farther, that the partnership in the boat, between Linton, the plaintiff and Hollman, may be dissolved, the boat sold, and that Hollman be cited; and that he and Linton may render an account of, and pay the plaintiff his share of the profits.

Linton, Lewis & Co. filed an answer, avering that they employ d he plaintiff in the agency for no definite time; th it he rendered false and fraudulent accounts, and they discharged him; that they had advanced him more money than he lent for them.

Linton and Hollman answered they could not be sued for a dissolution of the partnership between the plaintiff and them in the same suit, in which he claims damages from Linton, Lewis & Brower; that the plaintiff and they are under a contract with Lewis, that the boat shall be employed during eighteen months in piloting, &c.

With leave, the suit was discontinued as to Hollman.

The jury found a verdict for the plaintiff, and assessed his damages to $1,566 66; and he had judgment accordingly.

The defendants appealed.

It does not appear that the inferior courts gave any judgment on the plea in abatement of inton, in regard to the claim of the plaintiff, relating to the boat purchased by the latter, and Linton & Hollman.

For any thing that appears on the record, the damages given are compounded of those

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Thompson vs Linton & al.

claimed against Linton, Brower & Lewis; and those claimed of Linton, in the connexion that subsisted between the plaintiff and Hollman. The whole matters is in the petition, in regard to two distinct transactions, and between two different sets of contracting parties, appear to have been submitted to the jury—whether they assessed damages on both claims, and on which, if one only was considered, is a matter of doubt. But the defendants, Brower and Lewis, are utter strangers to the part of the plaintiff's complaint, resulting from the conduct of his co-partners in the purchase of the boat.

The defendant Linton, has a right to know the amount of damages he is mulcted with, either in both, or either of the claims of the plaintiff; and the other defendants must not be left in doubt whether they be not charged with a part of the plaintiff's demand against Linton.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; the verdict set a side; and the case remanded, with instructions to the judge to grant judgment on the plea of abate-

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ment, and proceed afterwards according to law; and it is ordered, that the plaintiff and appellee pay costs in this court.

Pierce for the plaintiff, *Preston* for the defendants.

WAKEMAN vs. *MARQUAND & AL.*

APPEAL from the court of the first district.

A verdict will not be set aside, because the jury took depositions with them in the jury room.

And that, altho' part of them were legal evidence, and part were not.

Whether the printed statutes of another state, are evidence: *quere.*

But they are, when the copy introducedhas been sent by the executive of the state where they were passed to the governor of this.

The common law of a sister state, may be proved by parol.

PORTER, J. delivered the opinion of the court. This is an action on an open account, which is composed of various items for cash lent, stock sold, and the balance of an interest account. The amount due is stated to be $4,536 58.

The petition was served on Paulding alone, who pleaded the general issue; and to that defence added an allegation, that the claim was false and fraudulent, and made in combination with his partner Marquand, the other defendant on record.

The cause was submitted to a jury, who found a verdict in favour of the plaintiff, for $3,520 21; and from the judgment rendered in conformity therewith, the defendant appealed.

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There was an application in the court below for a new trial, which was refused.

In this court, three grounds have been relied on, to obtain a reversal of the judgment of that of the first instance.

First. That there was error in permitting the jury to carry with them, when they retired to consider of their verdict, certain written depositions taken in the cause, and an account signed by Marquand; though the court had previously decided that part of these depositions, and the acknowledgment at the bottom of the account were not evidence against Paulding, the real defendant.

Second. That the printed statutes of New York, were not legal evidence to prove the rate of interest in that state.

Third and lastly. That the verdict is contrary to law and evidence.

In relation to that part of the first ground, which alleges as error, the permission given to the jury to take with them the account signed by Marquand, we have had no difficulty. That account was annexed to, and made part of the petition; as part of the pleadings, therefore it was correctly entrusted to the jury; and the circumstance of there

being an acknowledgment at the bottom, which the judge had declared was not evidence, would not have authorised him to withhold from the jury the whole of the petition.—The code of practice, though it does not explicitly mention that the jury are to take the pleadings with them, evidently contemplates they should; for it states, that the foreman is to write his verdict on the back of the petition, and that as soon as he has done so, notice is to be given to the court, if in session, that the jury are ready to give their verdict. *Code of Practice, Aart.* 522 & 518.

The permission accorded to the jury to take out with them depositions, part of which were, and part were not legal evidence, is not so clearly correct as that given in relation to the account which made part of the pleadings. In that country where the trial by jury originated, there was much strictness in regard to the jury taking out papers not under seal, which were read in evidence; and their doing so without leave, was in all cases considered a great contempt of the court, and in some instances held to be a sufficient cause for setting aside the verdict. In modern times, there has been a great, and, we think,

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a wise relaxation in the practice. We have found, however, no case where depositions are permitted to be handed to the jury; and the reason of this exception we presume to be, that it would be giving the party, whose testimony was reduced to writing, an advantage over the adversary who had given oral testimony, by enabling the jury to peruse the one in their retirement, and compel them to depend on their memory for the other.

In this state, however, where the whole of the the testimony is generally reduced to writing, (as was done in the case before us) this inequality does not exist; and it is most probable that it is owing to this circumstance, that the practice has been introduced among us, to permit the jury to take with them the evidence. We think it a good one—that it tends to facilitate the investigation of the case; and we do not feel inclined to disturb it. It is true, the court should not, if possible, permit any thing but legal evidence to be taken out: but when a great part of the depositions are legal proof, and part are not, there is considerable difficulty in carrying this rule strictly into effect. The course which presents the least inconvenience, we think, is to let

the jury have the whole, under the direction of the court as it was given here; that the parts objected to, were not to be taken into their consideration. It cannot be presumed they would violate this direction; and if they did, the party is always safe in the power which the court possesses to set aside the verdict, and grant a new trial. In the simple state of society which existed when the rule was established in the common law, the cases presented to a jury were of such a nature as did not require them to take documents with them. Such evidence was, indeed, rarely produced. Men's rights depended almost entirely on oral evidence: but, at the present day, when the diffusion of education, the extension of commerce, and the complex transactions of men, have introduced a quite different state of things —a different rule is indispensable to the administration of justice. It is not long since a case was before this court, which had occupied the attention of a jury for six weeks, where the whole transactions of a commercial partnership were required to be examined, and all the books were given in evidence. No human memory could have

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preserved a recollection of the testimony, nor could any judgment have been safely given without an opportunity being afforded to the jury to take the evidence with them in their retirement, and there to satisfy their doubts, by repeated perusals of it. *Co. Litt.* 227. 6. 1 *Trials per pais*, 257. *Salkeld*, 345 6 *Bac. ab.* 669. 7 *ibid.* 9 & 10. 5 *Binney*, 238. *Caulker* vs. *Banks*. *Vol.* 3 532.

II. We do not think the judge below erred in admitting the printed statutes of New York in evidence. The question has been decided differently in several of our sister states. In Vermont, Pennsylvania and North Carolina, they have been received. In Connecticut, and the circuit court of the U. S. for the state of Pennsylvania, a contrary rule has been established; and in North Carolina, they have lately, in opposition to the earlier decisions of their courts, refused to receive the printed statutes of another state, as evidence. It is certainly a great relaxation of the strict rules of evidence, to admit them as proof. Courts of one state cannot judicially know any thing of the authenticity of a book which purports to be the statute of another state; and there is no inconsiderable

danger in some instances, that they might be intercalated to serve the necessities of the case. We are not, therefore, prepared to say that the printed statutes of another state, unaccompanied by any evidence to establish their genuineness, are legal evidence. But this case stands on particular grounds. The book introduced, was brought from the office of the secretary of this state, and it was proved to have been sent from the executive of New York to that of this state. This circumstance greatly diminishes the objection to its introduction, and we think it was properly admitted as *prima facie* evidence. 2 *Haywood* 173. 1 *Dallas*, 462. 1 *Chip. Rep.* 303. 1 *Peters*, 352. 2 *Root* 250.

III. The last question is on the merits. The principal error alleged is the allowing interest when none was legally proved to be due. The judge was of that opinion, though he afterwards refused to set aside the verdict by which the defendant alleges that the sum charged in the account on that head was allowed. The charge of the judge was correct on the evidence admitted by him; but he erred in refusing the plaintiffs permission to prove by parol evidence

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that, according to the common law, and usage and customs of merchants of New York, interest was demandable on an open account, from the time it became due. The distinction between the proof necessary to establish the existence of written and unwritten laws, is perfectly settled; and parol evidence is the best that can be offered of the latter. But it is unnecessary to remand the cause on that ground. The whole account was acknowledged to be correct; and there are enough of items in it, independent of the interest to support the verdict The defendant has, however, urged that there are not a sufficient amount, when the credits given in the account are deducted. This is, perhaps, true; but if he relies on a document introduced by the plaintiff to establish his defence, he must take it altogether, and this would sustain the claim for interest. *Civil Code*, 2244. 2 *Starkie*, 47.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Morse for the plaintiffs, *Hennen* for the defendants.

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In a suit by one partner against another for a dissolution and settlement, to which the defendant consents, the referees may adjuge that the expences and costs should be paid out of the common stock.

APPEAL from the court of the parish and city of New Orleans.

MATTHEWS, J. delivered the opinion of the court. This is a suit brought by a partner in trade against his co-partner, in which the plaintiff prays for a dissolution of the partnership, and that the defendant should be compelled to render an account of the partnership affairs. The latter in his answer, consents to the prayer of the former, and requests a liquidation of the accounts by experts, &c.

The case was submitted to referees, whose award was made the judgment of the court, and its correctness is not questioned by either party; but the defendant appealed on account of an alleged erroneous taxation of costs by the court below. That court decided that he should pay the costs of the law suit; and that the expenses and charges which accrued in the adjustment of the accounts of the partners and dissolution of the partnership, should be borne by the common stock.

This decision, as to costs, does not appear to us to be illegal or unjust. The only difficulty or doubt that suggests itself, re-

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lates to the mode in which it is to be carried into effect; that is, how, in execution, the distinction is to be made between the costs occasioned by the conduct of the appellant, and those expenses which accrued in the final adjustment of the partnership's accounts and dissolution of said partnership.

This, however, is not considered sufficient to authorise a revisal of the judgment of the parish court.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

J W. Smith for the plaintiff, *Carleton & Lockett* for the defendant.

MARTIAL vs. *COTTEREL.*

APPEAL from the court of probates of the city and parish of New Orleans.

An agent is a competent witness, in all matters connected with his agency, without a release.

PORTER, J. delivered the opinion of the court. The petitioner states that he was in habits of great intimacy with the deceased, and that knowing his pecuniary wants, he frequently lent him money. That, in the year 1824, the plaintiff being about to leave

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this state, and having a certain sum of money in the hands of L. & M. Commagere, of the city of New Orleans, gave authority to the deceased to draw on them for the sum of $3,000.

That, with the same view, the petitioner authorised him to receive from others of his debtors, the sum of $959 87; that he did in his life time receive that sum, together with the $3,000, due by L & M. Commagere; and that the sum of $10, was paid by the petitioner for medical attendance on the deceased.

That the money due by Commagere, was left in their hands by Fontenay, who took their note for the same, and that this note exists in kind.

That the defendant, representative of the estate, refuses to acknowledge the justice of these claims, or to give up the note.

Judgment is prayed for the money received, and for the note, or the amount thereof.

The answer consists of the general issue, and an averment that the note belonged to the estate of Fontenay; and that suit had already been commenced against the makers in the district court.

A witness whose interest is equal, is competent.

And his being liable for costs, will not render him incompetent, if he is at the same time agent

If A lends B money, by giving an order on C, and it is accepted, but the money not paid, the funds become the property of B, and in case of his death and insolvency, they cannot be claimed as the specific property of A

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On this issue the parties went to trial in the inferior court, and the judge below decided that the plaintiff should recover the money claimed in the petition, except that alleged to have been lent through the hands of Commagere.

The petitioner appealed.

Before the merits can be gone into, there are two bills of exceptions to be disposed of.

The first is to an opinion of the judge permitting the agent of the plaintiff, who had received a note for collection, and had collected it, to testify that he had paid the amount over to the defendant.

The court below did not err. An agent is a competent witness in relation to all matters done in the usual course of business, without a release. There is no rule of evidence better established, and it has been more than once recognised and acted on by this court. 2 *Starkie*, 764, 768. *Vol.* 1, *N. S.* 184 *vol.* 4. *ibid.* 335.

The second was to the admission of Commagere, the maker of the note. The general rule on this subject, is that when the witness is equally responsible to either of the parties, he is competent to testify between them;

but that where the opposite interests are unequal, the witness has an interest on one side, measured by the excess of the one over the other. The defendant insists the witness admitted here fell within the principle last stated, because though equally liable to either plaintiff or defendant for the amount of the note; yet, as he had been already sued by the latter, he was interested to defeat that action, in order to avoid the costs. 2 *Stark.* 752.

There is an exception to the rule just stated, where the witness who is responsible for the costs, is at the same time agent of the party calling him. Commagere stood in that relation to the plaintiff, and was correctly permitted to testify. There is one other ground on which he was properly received. This action is not for the note alone, but *for the note*, or *its amount*. Now for the *latter* purpose he was competent; because if his testimony enabled the plaintiff to recover the amount of the note from the defendant, of course the defendant would have a right to recover it from the witness. In point of fact, therefore, the witness was not interested in the costs, as, whether the plaintiff or defendant

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succeeded, judgment must be given against him in the suit commenced by the latter. 7 *T. Rep.* 480. 2 *East.* 458

On the merits, we are of opinion, the judge *a quo* erred. We have considerable reluctance to put our opinion in opposition to that of the court of the first instance, in matters of fact; but in this case, the weight of evidence appears to us conclusively with the plaintiff. Two witnesses swear positively, that the money was given as a loan. It is admitted on the record, that another who was absent from indisposition, would prove the same fact. Nothing in the evidence goes to contradict their proof; on the contrary, the situation of the deceased, and the relation in which he stood to the plaintiff, repel the idea that the plaintiff was indebted to the defendant in so large a sum. We see no middle course between giving judgment for the plaintiff, or declaring the witnesses perjured; for they explicitly state the money was *lent*.

But we do not think the plaintiff has established any specific right to the note. From the time the mandate of the plaintiff was accepted, and an agreement made

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to leave the money in the hands of the maker of the note, or a promise to pay interest, the money ceased to belong to the plaintiff, and became that of the deceased —the debt was due to him, and from him to the plaintiff.

It is therefore ordered, adjudged and decreed, that the judgment of the probate court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the plaintiff do recover of the estate of Theodore Fontenay, deceased, $3,999 87, to be paid by the defendant, curator thereof, in concurrence with the other creditors of said estate, and according to its rank and privilege, with costs in both courts.

Deny for the plaintiffs, *De Armas & Trabuc* for the defendants.

GRIFFON vs. *MAYOR & AL.*

APPEAL from the court of the first district.

If the farmer of the city revenue has notice, at the time of adjudication, that an ordinance then in its passage in the city council, if passed into

MARTIN, J. delivered the opinion of the court. The petition states that on the 25th of March, 1824, the farm of certain duties, to be collected on the wharfage of flatboats

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law, is to form a part of the conditions of the contract, he cannot resist its effect, on the ground that it was not a law at the time he contracted.

Selling flour by the barrel, or bacon by the single ham, on the levee, is selling by retail.

and others, was adjudicated to the plaintiff, for one year—during which, contrary to the custom, and in violation of the plaintiff's rights, several owners of boats have been threatened and harassed by prosecutions by one of the officers of the corporation, for selling flour by the single barrel and hams by the piece, whereby a number of owners of boats have been deterred from remaining along the levee, as they did before, and the plaintiff has been deprived of a large sum of money, which he would have otherwise collected under the adjudication of the same; and that he is entitled to damages.

The general issue was pleaded, the defendants had a verdict and judgment, and the plaintiff appealed.

At the trial, the defendants offered in evidence an ordinance of the city council, which had passed that body on the 23d of March 1824, and was read to the bidders before the adjudication, and referred to in the plaintiff's deed on the 25th, but which did not receive the approbation of the mayor until the 27th, the object of which was to restrain the sales by retail on board of boats along the levee. The plaintiff objected to

this piece of evidence, on the ground that the document was only inchoate and had not received its perfection, at the time of the adjudication; and the corporation could not, by an act of theirs posterior to the adjudication, derogate from the rights acquired by the plaintiff by his bargain with them.

We think the plaintiff having been informed, by the reading to the bidders and the reference in his deed, that the intended restriction was contemplated, and the ordinance establishing it on its way, he took the chance of its ultimate fate, and could not afterwards complain, if the ordinance became binding by the signature of the mayor. The judge acted correctly in admitting it.

The plaintiff excepted also to a part of the charge, in which the judge told the jury that "there is no doubt that selling by the barrel or by the ham, is selling by retail."

It does not appear to us the judge erred. The object of the ordinance was to prevent the levee from being obstructed by boats tarrying till a cargo of flour and hams was sold off by the single barrel and ham. Surely a

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boat load of hams must be said to be retailed when sold by the single ham.

We conclude, the plaintiff having had full notice of the passage of the ordinance by the council, although he sustained a *loss* by its becoming binding by the signature of the mayor, received no *injury* No forced interpretation was given to the prohibition to retail, when it was extended to prevent the disposal of a cargo of flour and hams by the single barrel or ham, although, heretofore, flour and hams might be sold in the boats by the pound or a less quantity.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Derbigny for the plaintiff, *Moreau* for the defendant.

CASTLEMAN vs. *STONE.*

The party calling a witness cannot object to his competency.

The partner of a firm other than a commercial one, is a good witness for his co-partner.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petition states that the defendant and one Thomas Phillips, were negro traders in partnership, and that they sold

a slave belonging to the plaintiff, and received the price for her; that, though often requested, they have refused or failed to pay the same; that they are in consequence bound jointly and severally, and that the defendant is specially liable to pay, because the price of the negro was received by him, and is in his possession.

The action was commenced by attachment, but the defendant appeared by his attorney, and pleaded the general issue. He further averred that his property had not been attached; that if any slave of the plaintiff was sold, she was sold by Thomas Phillips, and that the defendant was a stranger to the contract, and not bound by it.

There was judgment in the court below for the defendant, and the plaintiff appealed.

On the trial, the plaintiff took a bill of exceptions to the decision of the court, permitting the deposition of Phillips, who is stated in the petition to be a partner of the defendant's, to be read in evidenne.

We do not see how this objection could be taken by the plaintiff, as it appears by the return of the dedimus, that the witness was called before the commissioners, and sworn

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and examined on the part of the petitioner. But admitting that we could, we do not think it tenable. The parties were partners for buying and selling negroes. This is not a commercial, but a particular partnership, in which the partners are not bound in *solido;* and where, consequently, the interest which one of them has, in an action against the other, goes only to his credit, and not to his competency: for he can neither gain nor lose by the event of the suit, and the verdict could not be given in evidence either for or against him.

The plaintiff also objected to reading part of a deposition, in which certain conversations of the defendant were related. The court permitted it to be read; but, accompanied this permission with a declaration, that these declarations were immaterial. The more correct course would have been to have ordered them to be stricken out; but this error can work no injury to the plaintiff, as we shall not permit them to enter into our consideration, in examining the merits.

The evidence leaves the case doubtful; but does not so preponderate as to authorise us to reverse the decision of the court of the first instance.

The person who is alleged to be the partner, swears positively that the slave was placed in his hands to be sold by him; and that he sold the slave, not as the partner of the defendant, but as the friend of the plaintiff, and without charging commission. This statement is somewhat shaken by the circumstances of the witness having made a bill of sale in the name of the partnership, and taken a note payable to them for the price. But the character of the witness is unimpeached; he swears directly against his own interest, and the burthen of making the case clear was on the plaintiff. We, therefore, are of opinion the judgment of the court below should be affirmed with costs.

Preston for the plaintiff, *M'Caleb* for the defendant.

ELLIOT vs. *COX*.

APPEAL from the court of the first district.

The surety on an injunction bond cannot resist payment on the ground that the plaintiff did not record his judgment.

MARTIN, J. delivered the opinion of the court. The defendant, sued as the surety on a bond for obtaining an injunction, which was afterwards dissolved, denied that any

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thing occurred as a breach of the condition; and averred that if any thing did, the loss was sustained by the plaintiff's own neglect, who is thereby disabled from subrogating the defendant to the plaintiff's rights, mortgages and privileges.

An *alias fi. fa.* does not operate a discontinuance of the original writ of execution.

The estimation of property seized in execution, does not preclude the creditor from shewing its real value in a suit against the surety.

The plaintiff had judgment, and the defendant appealed.

His counsel urges that the surety is in this case discharged, because "by the act of the creditor the subrogation to his rights, mortgages and privileges, can no longer be operated in favor of the surety." *Civil code*, 432, *art.* 22—*new code*, 3030.

This is contended to be the case, because,

1. The plaintiff neglected to record his judgment.

2. The *fi. fa.* stayed by the injunction, was a lien or privilege on the personal estate of the principal, which the injunction did not destroy, although it suspended the sale. This lien or privilege was lost by the act of the plaintiff in discontinuing the first *fi. fa.* by suing out a new one or *alias*.

We do not think that the surety may, in this case, avail himself of the plaintiff's neglect to record his judgment, because the for-

mer interfered, or assisted the principal in interfering with the sale, at a period when the plaintiff had not acquired the lien or privilege the registry might have given.

Neither can we imagine that by an *alias*, or *pluries fieri facias*, the first suit is discontinued—if any property has been seized under it, the seizure may take place without the *alias* issuing, and we cannot see how the *alias* may prevent it—the *alias* are used to authorise the seizure of other property, when that originally seized proves insufficient. Neither the *alias* nor the *pluries* affect any right acquired by the plaintiff under the original *fi. fa.*

The record shews the seizure of the plaintiff's house and lots, of sufficient value to satisfy the plaintiff; the dissolution of the injunction, on the issuing which the surety was bound; and that finally, the United States absorbed all the principal's property, so that the plaintiff can no longer expect payment, except from the surety.

Our attention is drawn to a bill of exceptions taken by the surety's counsel, to the opinion of the court, admitting parol evidence of the value of the house and lot

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seized, and of the possession of several slaves by the principal

The evidence offered of the value of the property, is opposed as contradicting the appraisement subsequent to the seizure. As this appraisement would not be binding on the surety, we think he cannot avail himself of it, in such a manner as to preclude the plaintiff from showing it was too low.

The evidence of the possession of several slaves, is opposed as irrelevant. The case was not tried by a jury, and if the evidence be really irrelevant, we need not be bound by it; it would be a waste of time and money to remand the case for a new trial without this evidence.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs in both courts.

Preston for the plaintiff, *Strawbridge* for the defendant.

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The insured is not obliged to communicate a fact respecting the situation of the port of destination, the knowlege of which was equally within the reach of the insurer

Whether an article be perishable in its nature, or not, is to be ascertained by the usage & custom of the port where the goods are shipped.

APPEAL from the court of the first district.

MATTHEWS, J. delivered the opinion of the court. This is a suit brought on a valued policy of insurance, by which the defendants insured $2,500 worth of merchandise on board the schooner called the Sterling, at and from New Orleans to Xibara, and two other ports in the island of Cuba. The policy is made in the usual form of such instruments, and contains a memorandum by which a number of articles of merchandise are specially excluded from average, except general; concluding by an exception, which, in its terms, embraces all articles perishable in their own nature.

The answer contains a general denial of responsibility on the part of the insurers, and also an averment that they are released from any obligation to make good to the assured the alleged loss, on account of misconduct of the master of the vessel, in attempting to enter the port of destination without the aid of a pilot, or any other proper person on board.

On these pleadings, and the evidence in the

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cause admitted and rejected by the court below, two questions are raised for the consideration of this court:—whether there was any improper concealment by the plaintiff in relation to the manner in which vessels entered the port of Xibara, in not stating to the defendants, that there were no pilots belonging to that port, and that it was customary for masters to conduct in their vessels without assistance from any other person.

The particular enumeration of perishable articles in an ordinary policy does not prevent the insured from shewing, under the general clause, that other articles are perishable.

II. Whether the petition and answer considered in relation to the policy itself, the primary evidence of the cause, authorised the interrogatory put by the counsel for the defendants, to a witness introduced by the plaintiff, by which it was asked whether flour, which appears to have composed the principal part of her cargo insured, was an article perishable in its own nature? In the course of the trial of the cause, this interrogatory was propounded to a witness on the part of the defendants, (who are here appellants,) which the judge *a quo* would not suffer to be answered, and a bill of exceptions was taken to his opinion, refusing to authorise an answer.

As to the first of the questions, we are

clearly of opinion that there was no fraudulent concealment by the insured at the time of obtaining the policy, which is legally destructive of the force and effect of that instrument. The situation of the port to which the schooner was destined, in relation to pilotage, is a matter in its own nature, the knowledge of which was equal in facility of acquirement to both parties to the contract; it is a matter which both might be fairly presumed equally to know. See *Park on Ins. p.* 185 & 186, and *Phil p.* 85.

The propriety of the opinion of the judge below, by which he refused to admit evidence to prove that the cargo insured was composed of articles perishable in their own nature, is attempted to be supported on two grounds:—First, That no proof of that fact could legally be allowed, because it was not specially pleaded in the answer, &c.; and, second, that the interrogatory was too indefinite, as it did not limit the answer to perishableness, according to the custom of this port of New Orleans, in relation to articles ordinarily exported.

The merit of these grounds is wholly technical, and is inconsistent with that simplicity

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of practice established by law for our courts in all cases, and would be peculiarly severe in the present; as the question was put to the witness in strict pursuance of the clause used in the memorandum of the policy, which was evidently introduced with the intention of influencing the contract of the parties.

Whether the general exception contained in the memorandum of the policy of insurance now under consideration, which, after a specific enumeration of many articles, excuses the insurers from contribution on average unless general,—or in other words, from remuneration for a partial loss on all articles perishable in their own nature, must be interpreted according to the particular usage and custom of this port in relation to exports, or according to the sense and meaning generally recognised by merchants and traders, is a question which would most properly occur, after first ascertaining by testimony, whether the articles thus alleged by the defendant to be perishable in their own nature, are really such or not, according to the opinions, knowledge and belief of men skilled in matters of this kind.

By inserting the clause above stated, after

a long list of enumerated articles, the rule of interpretation that *expressio unius est exclusio alterius*, is completely destroyed; unless it be considered that such a clause in policies is wholly vain, nugatory and without sense and meaning; which would be in direct opposition to a sound and general rule of interpretation, which requires that every clause and expression in a law or a contract, is entitled to its full weight and effect; unless such interpretation lead to absurd results. We have been induced to make these remarks on two very plain and well known rules of construction, in consequence of some observations found in *Phillips on Insurance*, relative to the general provision usually inserted in the memorandums of policies, (to which the counsel for the plaintiff here referred us,) and wherein the author states that he has not met with any decision, in which the exception has been held in virtue of this general clause, to be applicable to an article not specifically named in the policy. See *Phil. on Ins, p.* 492.

To allow an inquiry in all cases, as to the nature of articles not enumerated, would certainly have a tendency to add to the

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difficulties which ordinarily occur in suits on contracts of insurance; but the apprehension or fear of that evil will not authorise courts of justice peremptorily to debar such an inquiry, in violation of well established rules for the interpretation of contracts in general, unless it be clearly shewn that those of insurance form an exception.

Being of opinion that the judge *a quo* erred in refusing to admit testimony on the part of the defendants, to shew that flour is an article perishable in its own nature; because, we believe, such testimony to be generally admissable, according to the terms of the contract on which the action is founded:

It is ordered, adjudged and decreed, that the judgment of the district court be annulled avoided and reversed. And it is further ordered, &c. that the cause be remanded, with instructions to the court below, to allow the defendant to prove by legal testimony, whether or not flour be an article perishable in its own nature; and that the plaintiff and appellee pay the costs of this appeal.

Carleton & Lockett for appellee, *Grymes* for appellant.